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FOREWORD.

Owing to the fact that the opinions of the District Court are printed in the record with the text and the notes so commingled as to make the opinions unintelligible; and because the first of these opinions is not reported in the Federal Reports; and because the Railway Labor Act is not completely printed in the Appendix to Petitioners' Brief, we call attention to the "Brief of Respondents in Opposition to Petition for Writ of Certiorari," filed in this case. That brief, except for the first 6 pages, consisted only of an Appendix in which, for the convenient use of the court, are printed—

OPINION I.

Opinion of Circuit Court of Appeals, filed June 10, 1929. (Rec., pp. 1136-1144), Reported in 33 Fed. (2nd) 13.

OPINION II.

Opinion of District Court on granting temporary injunction, filed August 2, 1927. (Rec. pp. 76-82)—not reported.

OPINION III.

Opinion of District Court holding Defendants (Petitioners) in contempt, filed February 6, 1928 (Rec. pp. 237-262), reported in 24 Fed. (2nd) 426.

OPINION IV.

Opinion of District Court, on making permanent the temporary injunction, filed April 19, 1928 (Rec. pp. 395-401), reported in 25 Fed. (2nd) 873.

OPINION V.

Opinion of District Court, on denying motion to vacate contempt order, filed April 19, 1928 (Rec. pp. 388-394), reported in 25 Fed. (2nd) 876.

RAILWAY LABOR ACT OF 1926.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1929.

No. 468.

TEXAS AND NEW ORLEANS RAILROAD COMPANY, *et al.*,

Petitioners,

vs.

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, etc., *et al.*,

Respondents.

BRIEF IN BEHALF OF RESPONDENTS.*
(After Issuance of Writ of Certiorari.)

Preliminary Statement.*

The petitioners' "concise statement of the case," although covering 48 pages of their brief, omits such important facts and so garbles others with argumentative misinterpretation that counsel for respondent feel it necessary to present: *First*, a really "concise statement of the case"; *Second*, a detailed review of petitioners' statement, so that the court may (if it desires) check the accuracy of

*Italics in this brief unless otherwise indicated are ours.

petitioners' many assertions which have no foundation in the record or in fact. These corrections of petitioners' statement are printed in the Appendix, because it is not necessary for the court to review the facts in the present case, under "the well-settled rule in this court that when two courts have reached the same conclusion on a question of fact, their finding will not be disturbed unless it is clear that their conclusion was erroneous." *Baker* v. *Schofield*, 243 U. S. 114, 118. Approved in *Geddes* v. *Anaconda Copper Mining Company*, 254 U. S. 590, 600.

The following "concise statement of the case" containing all that is material to the consideration of the questions presented will summarize the findings of fact made by the District Court *and* the Circuit Court of Appeals. *No error is urged by petitioners on the ground that any findings of fact were erroneous.*

A Concise Statement of the Case.

The allegations of the bill in equity filed by the present respondent (Brotherhood of Railway and Steamship Clerks) were summarized by the Circuit Court of Appeals as follows:

> "Since its organization in September, 1918, the Brotherhood has been authorized by a majority of the railway clerks in the employ of the Railroad Company to represent them in all matters relating to their employment, and that representation was recognized by the Railroad Company in dealings between it and such railway clerks before and after the beginning of a controversy as to wages between the Railroad Company and such clerks, following the application of such clerks, made in November, 1925, by the Brotherhood as their representative, for an increase of wages, and after the denial of that application by the Railroad Company, and the reference of that controversy by the Brotherhood to the United States Board of Media-

tion. While that controversy was pending before that Board, the Railroad Company undertook, instigated and encouraged the formation of a so-called 'Company Union' of railway clerks in the employ of the Railroad Company, to be known as 'the Association of Clerical Employees—Southern Pacific Lines' (herein called the Association), and through the Railroad Company's named general officers and agents having and exercising supervisory and directory powers over members of the Brotherhood endeavored in ways stated to influence, intimidate and coerce members of the Brotherhood to withdraw from it and to make the Association their representative in dealings with the Railroad Company in all matters relating to their employment, and by such means to prevent the railway clerks in the employ of the Railroad Company in Louisiana and Texas from freely, and without interference, influence or coercion, designating, by collective action, their representative in dealings with the Railroad Company in reference to their employment."

The Brotherhood prayed for an injunction to prevent the present petitioner (Texas & New Orleans Railroad Company) from "*interfering with, influencing,* intimidating *or coercing* plaintiff employes, or any of the seventeen hundred employes referred to herein with respect to their free and untrammeled right of selecting or designating their representatives for the purpose of considering and deciding disputes between such employes and the defendant railroad company as employer, as well as for any and all other purposes of said Railway Labor Act." (Rec., 44.)

The Brotherhood's right to an injunction was grounded in part upon the Railway Labor Act (U. S. Code Title 45, Chap. 8, Section 152), which provided in the third paragraph of Section 2:

"Representatives, for the purposes of this Act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means

of collective action, *without interference, influence or coercion* exercised by either party over the self-organization or designation of representatives by the other."

The Brotherhood's right was also grounded in part upon a contract then in effect between the plaintiff Brotherhood and the defendant Railroad, providing in part:

> "No discriminations will be made in employment retention or conditions of employment of employes because of membership or non-membership in labor organizations." (Rec., 38.)

The District Court stated the principal question presented and his conclusion thereon as follows:

> "The question here is simply whether under the Act passed for the purpose of settling disputes between carriers and their employees (which Act parties to this litigation seem to have, as far as the record shows, acted upon and adopted), Congress can do what it has done to insure that in the settlement of these disputes each side shall be represented by those of its own selection, uninfluenced by the action of the other.
>
> In short, Congress, recognizing that a primary requisite of settlement of a dispute is the truly representative character of those who bring it about, has determined to, and I think has legally declared conditions under which these relations, if they are maintained, and these disputes, if they are adjusted, are to be adjusted.
>
> Nor do I think it doubtful that while no property rights, in the sense of a definite and tangible thing is involved, that the right to work and to continue to work under arrangements which will insure fair wages and fair working conditions is a property right which Congress has the right to legislate about the preservation of, and a court has the power by appropriate order to protect." (Rec., 77.)

The court further held that so far as the bill sought or "might have the effect to strike at the mere organization or formation of the association or other Union" (the Com-

pany Union) "the bill cannot reach this, nor can or should the court enjoin the activities of the men in forming, fostering and promoting this Union. Whether the Union is, or is not, favored by the corporation, nothing in the Act either looks to or attempts to control the question of maintaining one Union against the other in the interest of the company or against the company." (Rec., 78.) Therefore, *the court refused to issue any injunction against the employes promoting the Company Union,* but authorized the issuance of a temporary injunction against the Railroad in the following language:

> "That a temporary injunction should be granted until the further orders of this court enjoining and restraining the defendant railway company, its servants and agents, from in any way or manner interfering with, influencing, intimidating or coercing plaintiffs or any of the employees represented by plaintiffs as a class, with respect to their own free and untrammelled right of selecting or designating their representatives for the purpose of considering and deciding disputes between the employees and the defendant railroad company, and as employees to their free and untrammeled right to self-organization. Nothing in this injunction shall be considered authority to prevent any employee of the railroad in the class referred to from organizing as many unions as he wants to, in any way he wants to, with the assistance of and aid of his fellow employees in any way and to any extent that he wants to, nor on the other hand to permit the officers of the company from, while such officers, attempting to influence or interfere with such formation upon the pretext that they are acting individually and not as company representatives." (Rec., 81, 82.)

This case, therefore, does *not* involve any contest or litigation between rival labor organizations, nor has the court restrained any group of employes from organizing and negotiating with their employer. The District Court restrained *only the railroad company and its officials* from

preventing employes from organizing themselves and designating their own representatives and from compelling employes to organize according to the employer's wishes and to designate representatives satisfactory to the employer. Thus it appears that *the statement of counsel for petitioners* (Petitioners' Brief, p. 19) that "this suit grows out of and essentially involves a dispute between two labor organizations" *is a serious misrepresentation of fact.* Even counsel for petitioners admit that the Association (the Company Union) had been "dormant in the interval" between the decisive victory of the Brotherhood over the Company Union in a secret ballot taken by the Railroad Labor Board in 1923 (Rec., 11)—and June 2, 1927, when the United States Board of Mediation began to mediate a dispute over a wage increase requested by the Brotherhood. (Petitioners' Brief, pp. 23-27.)

The District Court found that the "dormant" Company Union was revived by the Railroad for the following reason:

Vice-President Lull of the Railroad wrote to President McDonald on May 24, 1927, and explained that the Brotherhood had asked for the services of the United States Board of Mediation and that wages for clerical employes on the Southern Pacific Lines *west* of El Paso had recently been increased 5c per hour, and that if pending mediation proceedings resulted in an arbitration, the same increase in the Southern Pacific Lines *east* of El Paso (operated by the present petitioner, the Texas & New Orleans Railroad Company) would be increased "approximately $340,000 per annum." To prevent this increase, Vice-President Lull explained that they would "raise the question of the right of this organization (the Brotherhood) to represent these employees" and thus "get away from the interference of this organization and if successful in

this, I am satisfied we can make a settlement with our own employes at a cost not exceeding $75,000 per annum." (Rec., 773.) Following the adoption of the policy just described, the Company Union was revived—"said employes selected representatives who met, reorganized the Association, adopted a Constitution and elected officers on July 2, 1927." (Petitioners' Brief, p. 27.)

The inevitable conclusions of fact from the extensive evidence taken are stated by the District Court in the following language:

> "The genesis and motive of the entire activity of the defendants in organizing, promoting and maintaining the association (the company union) and in endeavoring to disrupt and unseat the Brotherhood (the employee union) as representatives, is made clear and plain through a letter written by Mr. Lull, one of the defendants in the contempt proceeding and Vice-President of the railroad company, to Mr. McDonald, its President, on May 24, 1927, prior to the activities complained of in this suit.
>
> That letter in brief declared that there was pending from the general committee of the national organization of the Brotherhood of Railway Clerks a request for an increase of 10 cents per hour; that it was practically certain, if the matter went to arbitration, an award would be rendered increasing the pay roll $340,000 per annum; that he proposed to refuse arbitration upon the question of the right of the Brotherhood to represent the employees, and stated: 'This will permit us to get away from the interference of this organization, and if successful in this, I am satisfied we can make settlement with our own employees at a cost not to exceed $75,000 per annum.'" (The words bracketed above are ours.) (Rec., 395, 396.)

Notwithstanding the issuance of the temporary injunction, the railroad proceeded, through its responsible officials, to violate the statute and the injunction as a result of what the District Court found to be "a strong and set-

tled purpose to defy both." (Rec., 253.) The District Court found:

"Many affidavits were submitted on the hearing for the injunction which abundantly established that the activity of the officers and agents of the railroad company in securing authorizations was inspired by the company, while the record teems with evidence that the Association was the favored child of the defendant company, and, if not created, was largely sponsored, promoted, and maintained by it. The evidences of activity in violation of the statute, and of the injunction occurring since, are more numerous, cogent, and powerful.

Not only did the railroad company, with a sheer and gratuitous wantonness of spirit, reject the offices of the Board of Mediation, created and operating under this same Act, before whom, at the time of the filing of this suit, a wage dispute initiated by the Brotherhood was pending, but before the ink was hardly dry upon the order of injunction proceeded to nullify it by recognizing as truly representative the Association, all of whose authorizations had been filed with the defendant Torian before this suit was filed, and the most of which had been obtained, as found by the court, by the use of means in violation of the statute." (Rec., 255.)

The District Court described the revealed purpose of the railroad and summarized the evidence presented to the court upon the contempt hearing in the following language:

"In short, upon a foundation laid in direct violation of the statute, they have sought to erect a superstructure of exclusive representation, and in the face of a statute and an injunction designed to secure the observance of the fundamental maxim, '*Audita alteram partem*,' they have gone about to arrange it so that the railroad would be in a position of surely having a vote on both sides of the table, its own side and that of its employees.

"In view of all these facts, and of the further controlling and dominant fact that, in the face of the agreement and understanding that the Brotherhood

should continue to represent the clerks until by secret ballot other representation was selected, it appears that organizers of the Association of Clerical Employees have been sent out, on company time, and on company pay, and with company consent and approval, to organize the Association, while officers of the Brotherhood have been discharged from the service and excluded from wage conferences, members of the Brotherhood have had their pay docked for the time spent on its business, and other members have been dismissed from the service, it would be a sticking in the bark to discuss in detail the evidences with which this record teems of a deliberate violation of this injunction, legalistic, perhaps, through the advice of counsel, but none the less a violation." (Rec., 257, 259.)

Prior to the contempt hearing, counsel for the railroad did not contest the right of the court to enjoin, coercion of the employees in violation of the Railway Labor Act. (Rec., 237.) In the contempt hearing the defense of the invalidity of the Act (which had not been raised in the answer to the bill) was first suggested. The court sustained the validity of the law, but pointed out that error in issuing an injunction could not be set up as a defense to a charge of disobedience.

The case came on for final hearing on the merits on March 12, 1928, at which time over 500 pages of additional testimony were taken, including a large number of highly important exhibits. (Rec., 576-1092.) It must be apparent that the voluminous evidence oral and documentary taken in this case could not be adequately reviewed, even in petitioner's long and partisan statement of the case. The District Judge heard all the evidence in open court and made definite findings upon this evidence in the four opinions handed down. The Circuit Court of Appeals analyzed the pleadings *and the evidence* in its opinion and found that "the allegations and proofs warranted the granting of injunctive relief." The Court of Appeals also found that

"the action of the court in the contempt proceedings in imposing conditions to the purging of contempt found to have been committed did not go beyond requiring the undoing of what had been done in violation of the injunction."

Thus, since the two lower courts "reached the same conclusion on a question of fact, their finding will not be disturbed unless it is clear that their conclusion was erroneous." (*Baker* v. *Schofield, supra.*) There is no foundation in the record or in fact for the statement of counsel for petitioners that the Circuit Court of Appeals affirmed the judgment "without any review of the disputed facts," nor for the further statement that the Circuit Court of Appeals affirmed the judgment "without consideration by it of the disputed facts." These statements, like others in the brief of petitioners, lack "that candor which is essential to the proper and adequate presentation of a cause in this court." (*New York Central Railroad Company* v. *Johnson,* 279 U. S. 310.)

(Further detailed corrections of petitioner's statement of the case are printed as an Appendix of this brief.)

SUMMARY OF ARGUMENT.

Point I.

The purpose of the Railway Labor Act and the intention of Congress in providing for self-organization of employes and designation of representatives without interference, influence or coercion by the employer is shown by the history of the legislation.

Point I-A.

1. Congress intended in the Railway Labor Act of 1926 "to provide for the prompt disposition of disputes between carriers and their employes"—by the making of enforceable contracts. This is the purpose expressed in Section 2, Paragraph first.

> "First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

2. In order to make such contracts effective and enforceable, Congress provided that they must be made between duly authorized representatives of the contracting parties. This is the purpose expressed in Section 2, Paragraph second.

> "Second. All disputes between a carrier and its employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respec-

tively, by the carriers and by the employees thereof interested in the dispute."

3. In order to prevent fraud in the making of such contracts and to protect their enforceability, Congress provided that neither contracting party should interfere with the self-organization or designation of representatives by the other. This is the purpose expressed in Section 2, Paragraph third.

> "Third. Representatives, for the purposes of this Act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence or coercion exercised by either party over the self-organization or designation of representatives by the other."

The following quotation from an opinion of the Supreme Court is pertinent:

> "Whatever may be the advantages of 'collective bargaining' it is not bargaining at all in any just sense unless it is voluntary on both sides.
>
> * * * * *
>
> "The case involves no question of the rights of the employes. Defendants have no agency for plaintiff's employes, nor do they assert any disagreement or grievance in their behalf. In fact, there is none; but, if there were, defendants could not, without agency, set up any rights that employes might have."
>
> *Hitchman Coal & C. Co.* v. *Mitchell*, 245 U. S. 229, 250, 253.

4. A review of forty years of federal legislation to protect Interstate Commerce, and particularly railroad transportation, from injuries caused by labor disputes leads to the inevitable conclusion that Congress, in passing the Railway Labor Act of 1926 to promote and to protect collective bargaining, recognized that the rights of employes freely to organize and to designate *bona fide* representatives

must be written into statutory law, for the very purpose of insuring the protection of these rights in the courts of the United States.

Point I-B.

1. The right of railway employes to organize and to designate representatives, and the duty of railway employers to refrain from interfering with self-organization and designation of representatives by employes, are legally enforceable—even though the statute makes no explicit provision as to a remedy for their violation.

The Circuit Court of Appeals in the instant case held as follows:

> "A violation of a duty created by statute resulting in damage to one of the class for whose benefit the duty was imposed confers a right of action upon the injured person, though the statute makes no provision as to a remedy for such a wrong."
>
> *Texas & New Orleans Railroad Company* v. *Brotherhood of Railway and Steamship Clerks*, 33 Fed. (2nd) 13.

The foregoing proposition of law is supported by many cases under the following head:

> "The rule that wherever the law recognizes a right it gives a remedy applies to statutory as well as to common-law rights; and so wherever a statute creates a new right or duty, and does not prescribe any particular remedy for its enforcement, the party entitled to the benefit of the statute may resort to any existing remedy which will afford adequate and proper redress, whether it be a common-law or a statutory remedy."
>
> 1 *Corpus Juris* 986.

> "The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right (citations); and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property

already acquired (citations). It is this right that furnishes the basis of the jurisdiction in the ordinary case of unfair competition."

International News Service v. *Associated Press*, 248 U. S. 215, 236.

2. When the Railway Labor Act is read as a whole, it is evident that Congress intended to make legally enforceable those rights and duties which must be enforced in order to make the Act effective to accomplish its purposes.

3. If resort to extraneous sources of construction is necessary to clarify the intention of Congress, it is made apparent from the reports from the Committees of both Houses and from the statements of those in charge of the legislation that Congress intended to make enforceable numerous mandatory provisions of the Act, including those involved in this case.

Point I-C.

1. The Railway Labor Act, in imposing legally enforceable rights and duties upon carriers and employes in Section 2, does not violate any constitutional limitation, but on the contrary provides protection for constitutional liberty of contract and rights of property.

2. Such restraints upon an absolute liberty of contract as are imposed by the Act, alike upon employers and employes, are only requirements necessary to safeguard the public interest and to provide for the exercise of the rights of one party "with reasonable regard for the conflicting rights of others." Such restrictions are necessary and constitutional.

C. B. & Q. Railroad Company v. *McGuire*, 219 U. S. 549.

Hitchman Coal Co. v. *Mitchell*, 245 U. S. 229, 254.

Highland v. *Russel Co.*, 279 U. S. 253, 264.

Point II.

(In reply to petitioners' Point 5.)

Section 20 of the Clayton Act does not prohibit the granting of an injunction in this case to protect the property rights of complainants from irreparable injury.

Point III.

(In reply to petitioners' Point 3.)

The equity power has not been invoked to determine an "abstract right" but to protect liberty of contract and rights of property.

Point IV.

(In reply to petitioners' Points 6 and 7.)

The District Court enjoined the present petitioners from violating their legal obligations under the statute; and the contempt order did not broaden the injunction and was not retroactive in effect.

Point V.

(In reply to petitioners' Points 8, 9 and 10.)

The petitioners violated the temporary injunction, destroyed the *status quo* and the court was authorized to require them in purging themselves of contempt to restore the *status quo*.

Point V-A.

The injunctions, both temporary and permanent are in proper form.

IN REPLY TO PETITIONER'S ARGUMENT.

It is the obvious effort of counsel for petitioners to obtain, in this court, a re-trial of issues of fact found against them in the two lower courts. We will not join them in thus seeking to obscure the *legal* issues upon which this case should and will be decided. Therefore, we will not reply *seriatim* to petitioners' points, set forth on pages 60, 61 of their brief. But before presenting our own argument upon the legal issues, which are decisive of the present case, we will comment briefly upon petitioners Point 1 as a good example of their effort to raise and to argue issues of *fact*, instead of issues of *law*.

Petitioners' Point 1 is the following:

> "Mere suggestion or advice by officers and agents of the Railroad to employes with respect to their organization, or selection of representatives is not unlawful, nor violative of the Railway Labor Act of 1925, nor subject to be enjoined."

Their argument made under this point depends entirely upon the *false assumption* that "mere suggestion or advice" by officers of the railroad to employes is the violation of the Railway Labor Act which was charged and enjoined in the present case.

The findings of fact by the District Court, confirmed by the Circuit Court of Appeals, prove the utter falsity of this assumption.

> "The railroad company * * * before the ink was hardly dry upon the order of injunction proceeded to nullify it." * * * "with a fell and steady purpose, it set itself about, with a callous indifference to the spirit as well as the letter of the statute and the order, the task of not only more firmly seating the association of Clerical Employes (Company Union) but of

crushing any effort on the part of other employes to secure other representation, if they so desired." (Rec., 256.)

* * * * *

"In short, upon a foundation laid in direct violation of the statute * * * they have gone about to arrange it so that the railroad would be in a position of surely having a vote on both sides of the table, its own side and that of its employes." (Rec., 257.)

The District Court did not grant the original injunction upon evidence of "mere suggestion or advice." The District Court found that the conduct of the railroad officers went far beyond "mere suggestion or advice:"

"It is plain that, in the sense which the statute sought to avoid, the mischief is taking place, and that the company is * * * interfering with or influencing the self-organizatin of these employees. * * * I think the proof sufficient to show that there has been enough activity of company officers * * * to bring about a condition of company influence on self-organization within the provisions of the Act." (Rec., 80.)

Later, in finding railroad officials guilty of contempt for violating the injunction in this case, the court said:

"Nor do I think it more debatable that both the letter and the spirit of the statute and of the injunction have been violated. While it is hard to believe that a railroad and its officials would deliberately seek to set at naught both the legislative and the judicial power of the United States, it is difficult to avoid the conclusion that the violation of the statute and of the injunction which followed its violation, was the result of a strong and settled purpose to defy both, and that that spirit of heady violence to obtain its ends, which has so often exhibited itself in these labor disputes, in the conduct of employes when the injunction was the other way, is not absent here." (Rec., 253.)

* * * * *

"The evidences of activity in violation of the statute and of the injunction occurring since (the temporary

injunction was granted) are more numerous, cogent and powerful." (Rec., 256.)

Still later the court in making the temporary injunction permanent said:

> "On this hearing the evidence more abundantly even than on the previous hearings established a deliberate disregard and violation of the terms of the statute, and, after its issuance, of the temporary injunction, by the defendant company through a calculated and studied interference, both with the self-organization and the designation of representatives by the employes." (Rec., 395.)

And finally the court in denying a motion to vacate its contempt order held:

> "Here the record teems with evidence of * * * continuing acts on the part of the (railroad) company designed and tending to disrupt, disintegrate, and destroy the Brotherhood (respondents here) while establishing in the seats of the mighty the Association" (The Company Union). (Rec., 389.)

In conclusion on this point we may appropriately, and once more, quote from an opinion of the District Court:

> "It would be a sticking in the bark to discuss in detail the evidence with which this record teems of a deliberate violation of this injunction." (Rec., 259.)

It would be indeed "a sticking in the bark" for us to join with counsel for petitioners in discussing the legal issues which are involved in this case on the basis of an unjustifiable assumption that the violation of statutory obligations and injunctive commands which are charged against the petitioners consisted of giving "mere suggestion or advice" to employes. We will proceed to a discussion of the real issues of this case and avoid, so far as possible, following counsel for petitioners into the discussion of mythical issues.

The Primary Issue.

The primary issue presented upon the present petition is whether the District Court had jurisdiction to entertain the bill filed and to grant relief in protection of what the District Court described as "the century old right of representation, a right granted to the employes by Congress in mandatory language, that they should select their own representatives without interference by the railroad company." (Rec., 399.) If employes have the right claimed, which can properly be protected by a court of equity, there can be no serious question that the evidence presented to the District Court showed wilful, flagrant and repeated invasions of that right and that the injunctions of the court granted for the protection of that right were wilfully, flagrantly and repeatedly violated. Therefore, we will confine this brief, so far as possible, to a discussion of this primary and most important legal issue under the following heads:

First: The purpose of the Railway Labor Act of 1926 and the intention of Congress in providing for self-organization of employes and designation of representatives without interference, influence or coercion by the employer.

Second: The enforceability of the right of the employes to free representation, made apparent from either (a) reading the Act alone; or (b) resorting to appropriate "extraneous matter" to find the "true legislative intent."

POINT I.

The purpose of the Railway Labor Act and the intention of Congress in providing for self-organization of employes and designation of representatives without interference, influence or coercion by the employer—is shown by the history of the legislation.

A brief review of the history of industrial controversies affecting railroad transportation and the legislation enacted from time to time by Congress to provide means for the peaceful and orderly adjustment of such controversies is necessary to a proper interpretation of the present Railway Labor Act.

Genesis of Railway Labor Act.

Bulletin No. 303 of the United States Bureau of Labor Statistics reviews the "use of federal power in settlement of railway labor disputes." From the careful detailed history there provided, some facts peculiarly pertinent to the present issue will be extracted.

Act of October 1, 1888.

As early as 1882, Congress began to consider devices for the settlement of railway labor disputes. After various Congressional investigations the first legislation was enacted in the Act of October 1, 1888, which provided, in brief, for voluntary arbitrations of railway labor disputes and for the appointment of Presidential Commissions to investigate and attempt to bring about the settlement of such disputes. It is well to note that in this first legislative Act it was provided:

> "Section 4. It shall be the right of any employes engaged in the controversy to appoint by designation, in writing, one or more persons to act for them in the

selection of an arbitrator to represent them upon the board of arbitration."

Thus it appeared to have been found necessary over forty years ago for Congress to specifically affirm the obvious, inherent right of employes engaged in a controversy to choose their own representatives to act for them *in a contractual settlement* of that controversy.

Pullman Strike of 1894 and the Debs case.

During the ten years when the law of 1888 remained on the statute books, the arbitration provisions were never used. The investigative provisions were used in connection with the Pullman strike of 1894. The development of the Pullman strike is described in the opinion of the Supreme Court in the case *in re Debs*, 158 U. S. 564. It is interesting to note, before a consideration of that case, that ten years before the Pullman strike, Eugene V. Debs, as Editor of the Firemen's magazine had made the following written statement:

> "We have said we are opposed to strikes as a means of settling controverted labor questions. We are opposed to strikes primarily because we are satisfied they do not promote the welfare of the laboring man. We are persuaded from readings, observation and experience that there is a better way out than to 'strike' out." (Bulletin No. 303, page 7.)

The importance of the Debs case in the present historical review lies particularly in the enunciation of principles as to the authority of the government to intervene in industrial controversies threatening the interruption of interstate transportation, and the propriety of exerting the equitable jurisdiction of the federal courts in this regard. The following quotations are pertinent:

> "It is obvious from these decisions that while it is not the province of the government to interfere in the mere matter of private controversy between individu-

als, or to use its great powers to enforce the rights of one against another, yet whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the nation, and concerning which the nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties." (Page, 586.)

* * * * *

"Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same today as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so it is with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates today upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop. * * *

* * * * *

"A most earnest and eloquent appeal was made to us in eulogy of the heroic spirit of those who threw up their employment, and gave up their means of earning a livelihood, not in defense of their own rights, but in sympathy for and to assist others whom they believed to be wronged. We yield to none in our administration of any acts of heroism or self-sacrifices, but we may be permitted to add that it is a lesson which cannot be learned too soon or too thoroughly that under this government of and by the people *the means of redress of all wrong are through the courts and at the ballot-box* and that no wrong, real or fancied, carries with it legal warrant to invite as a means of redress the co-op-

eration of a mob, with its accompanying acts of violence." (Page 598.)

The Commission appointed by President Cleveland, after this strike, made recommendations for the settling of railway labor disputes (which were not enacted into law), which included recommendation of a permanent commission to decide disputes, with the provision that pending investigation and six months following a decision, no railroad could discharge an employee, except for certain specified reasons, nor could employes strike or boycott. There was also a recommendation of legislation to encourage the incorporation of labor organizations. (Bulletin No. 303, page 19.)

Thus early in our history we find recognized the need for controlling the arbitrary use of the employer's power of discharge and the desirability of creating responsible labor representation.

The Erdman Act of June 1, 1898.

After extensive consideration of numerous bills by Congress the Erdman Act was passed and became a law on June 1, 1898. "This law had been before Congress practically in the form in which it was adopted for more than three years. During that time all the interests affected had ample opportunity to have their case heard on the merits of the plan proposed." (Bulletin 303, page 24.)

The Erdman Act applied only to employes actually engaged in train service operations and it provided for government mediation and, in the event of its failure, for voluntary arbitrations with the arbitrators to be named as follows:

> "One shall be named by the carrier or employers directly interested; the other shall be named by *the labor organization* to which the employees directly interested belong, or, if they belong to more than one,

by that one of them which specially represents employees of the same grade and class and engaged in services of the same nature as said employees so directly interested: Provided, however, that when a controversy involves and affects the interests of two or more classes and grades of employees belonging to different labor organizations, such arbitrator shall be agreed upon and designated by the concurrent action of *all such labor organizations;* and in cases where the majority of such employees are not members of any labor organization, said employees may by a majority vote select a committee of their own number, which committee shall have the right to select the arbitrator on behalf of said employees."

Here again it will be noted that in order to obtain the *contractual settlement* of labor disputes, it was found necessary to provide for the selection of employe representatives who should be truly representative of the employes involved in the dispute.

The Erdman Act also provided in Section 7 that it should be unlawful for an employer to discharge employes during the pendency of an arbitration (except for specified causes), or for the organization representing the employes, or for the employes, to strike; with similar limitations upon the action of both parties for a period following the award.

Section 9 provided that when federal receivers were in control of railroads "the employes upon said railroads shall have the right to be heard in such courts upon all questions affecting the terms and conditions of their employment *through the officers and representatives of their associations,* whether incorporated or unincorporated."

Section 10 prohibited any employer from requiring, as a condition of employment, that an employee should agree "not to become or remain a member of any labor corporation, association or organization" and prohibited discrimination against an employe because of such membership, and

made the prohibited acts misdemeanors, subjecting the offendor to criminal prosecution. The provisions of this section were held unconstitutional by the Supreme Court in the case of *Adair* v. *United States*, 208 U. S. 161, which will be discussed later in this brief.

For eight and one-half years after its passage, the Erdman Act was a failure, the only effort to use it having been unsuccessful because the railroads involved refused to enter into mediation proceedings. But from December, 1906, to July, 1913 (when the Newlands Act was passed), the Erdman Act was frequently invoked. Out of sixty-one requests for mediation, twenty-six cases were adjusted through mediation, ten by mediation and arbitration and six by arbitration alone. The remaining nineteen cases were disposed of in various ways. No arbitration award was ever repudiated and there was only one appeal to the courts from an arbitration decision. The sixty-one cases affected a total of more than 680,000 miles of trackage and over 250,000 employes. (Bulletin No. 303, page 31.)

The Erdman Act "marked a great step forward in the evolution of a sane method for the settlement of railway labor troubles in the United States." But defects in the machinery provided developed during practical operation, particularly the necessity for a permanent Board of Mediation and the desirability of having more than one neutral arbitrator for controversies of large moment.

The Newlands Act of July 15, 1913.

The Newlands Act provided for a permanent board of mediation. It also provided for boards of arbitration consisting of three or six arbitrators; one-third appointed by each side, and one-third either by agreement, or by the board of mediation. In order to assure proper re- senta-

tion of employes in settlement of controversies through arbitration, the Act provided:

> "In the event that the employes engaged in any given controversy are not *members of a labor organization,* such employes may select a committee which shall have the right to name the arbitrator or the arbitrators who are to be named by the employes as provided above in this section."

The Act also provided in Section 4 for the terms of an agreement to arbitrate, including the provision that the agreement "shall be signed by *duly accredited representatives* of the employer or employers and of the employes."

The Act continued the provisions of the Erdman Act, that when federal receivers control a railroad, the employes "shall have the right to be heard *through their repsentatives* in such court upon all questions affecting the terms and conditions of their employment."

The Newlands Act was effective from July, 1913 until federal control of the railroads during the world war. The report submitted to the President by the Commissioner of Mediation on December 1, 1919, showed the disposition of 148 cases involving 586 railroads and 620,810 employes. 70 cases were settled by mediation; 21 by mediation and arbitration; 19 by the parties after mediation began and the remaining 38 in various ways. Despite this favorable record, dissatisfaction developed with the law, particularly on the part of the employes whose spokesmen, with increasing frequency, took the position that "arbitrators are necessarily selected from the master class which either takes its profits from the labor of others, or else is employed by corporations in the capacity of officer or attorney." Other less interested critics pointed out the unfortunate results of decisions by neutral arbitrators unacquainted with the technique of railroading and lacking the

experience necessary to solve the complicated questions presented to them. (Bulletin No. 303, page 54.)

The Government Bulletin just quoted pointed out that—"arbitration is likely to find favor with the weaker, rather than with the stronger party to a dispute," and instanced the fact that, when railroad labor organizations were weak, railroad managers opposed arbitration and government intervention; but that, as railroad labor organizations grew stronger, conditions were reversed and the railroad managers particularly favored arbitration.

The Adamson Law.

Because of the prevailing dissatisfaction with mediation and arbitration, the concerted effort of the four transportation brotherhoods to establish the eight hour day brought about the imminent threat of a nation wide strike in the summer of 1916. In order to prevent this President Wilson asked Congress to pass a law to establish the eight hour day for train operatives, on the ground that "the whole spirit of the time and the preponderant evidence of recent economic experience spoke for the eight hour day." The Adamson Law was passed and approved by the President on September 3, 1916. The spokesmen for the railroad brotherhoods expressly disclaimed responsibility for seeking this legislation, but stated that its passage would prevent the strike; and that was the result. The constitutionality of the law was upheld in *Wilson* v. *New*, 243 U. S. 332 by a divided court. This case will be discussed later in the brief. But it is pertinent here to point out that even the majority of the court affirmed the right of railroad employers and employes to exercise the private right of contract "free from legislative interference," and sustained the legislative power as properly exercised "to protect the public interest from injury resulting from *a failure to*

exercise that private right." Thus it appears that the majority and minority opinions in this case both support thoroughly the power of Congress to encourage the exercise of "the private right of contract" by railroad employers and employes, and support the power of Congress to insure a *valid* exercise of the right of contract through representatives duly designated and authorized to act by both parties and free from the improper exercise of interference, influence or coercion by the opposing party.

Federal Control of Railroads.

The operation of the steam railroads was taken over by the government as a war measure on December 31, 1917. Among the measures taken to insure harmonious labor conditions, the Director General issued General Order No. 8 February 21, 1918 "to correct wrong impressions that may exist regarding the employment and conditions of labor in railway service." A particularly pertinent paragraph of this order read as follows:

> "5. No discrimination will be made in the employment, retention or conditions of employment of employes because of membership or non-membership in labor organizations."

According to Director General Hines, the effect of the foregoing order of his predecessor was as follows:

> "This at once opened the way for the labor organizers to proceed unhampered to organize the employes who were not already organized and the opportunity was promptly and successfully utilized."

In his book entitled "War History of American Railroads," from which the foregoing quotation is taken (Page 155) Mr. Hines (a railroad official before and since federal control) carefully analyzes the efficiency of railroad labor during this period of extensive labor organization and reaches the following conclusion (Page 189):

"Any studied consideration of this matter must lead to the conclusion that, despite the numerous reasons why the productivity of railroad employes might easily have been greatly impaired during Federal Control, the general average of the railroad efficiency in that period makes an extremely favorable comparison with pre-war efficiency and compares with post-war efficiency fully as well as does industrial war-time efficiency with post-war efficiency."

Not only did the Railroad Administration find it necessary in a time of national emergency to permit free and untrammelled choice of labor representatives, in order to stabilize industrial relations through collective bargaining, but *all other essential industries did likewise.* This universal recognition of the value and necessity of labor organization is highly important in understanding the basis and purpose of *post-war* legislation and the shift in prevailing opinion concerning industrial relations, which is entitled to consideration in the courts as well as in the legislatures.

"Regulations, the wisdom, necessity and validity of which, as applied to existing conditions are so apparent that they are now uniformly sustained, a century ago, or even half a century probably would have been rejected as arbitrary and oppressive." *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 387.

Prevailing Labor Policies during World War.

The adoption of a national labor policy became an obvious necessity soon after the entrance of the United States into the World war. The development and application of such a policy is described in detail in Bulletin 287 of the United States Bureau of Labor Statistics, which is entitled "National War Labor Board," to which bulletin references will be made for the authority of the following statements. On September 6, 1917, a proposal to create a federal board to adjust labor disputes was submitted, by invitation, to

the Council of National Defense by the National Industrial Conference Board. (The National Industrial Conference Board was, and still is, a representative organization of employers, of far reaching influence.) The recommendation at the outset urged the Council of Defense—

> "To adopt and reassert as its guiding principle the fundamental American doctrine authoritatively stated by the Anthracite Coal Strike Commission with the approval of representatives of both employers and unions included in its membership and commended as the basis of industrial adjustments by Presidents Roosevelt, Taft, and Wilson: *That no person shall be refused employment or in any way discriminated against on account of membership or nonmembership in any labor organization.*"

It should be again emphasized that the foregoing was the recommendation made by an outstanding, national and thoroughly representative organization of *employers.*

The War Labor Conference Committee of the National Council of Defense thereupon reported December 20, 1917 to the Council, among other things, that "a series of understandings concerning certain underlying principles affecting labor should be arrived at between representatives of employers, employees and the government." Among the questions to be considered were listed, discrimination against union and non-union men, method of adjusting disputes and "right of workmen to organize."

Thereafter the Secretary of Labor, having been made responsible by the President for the inauguration of a "national labor program," requested the National Industrial Conference Board to designate five persons "who will adequately and appropriately represent the employers of the country," and the American Federation of Labor to designate five to represent the workers and asked the five employer representatives to name a sixth "who will represent the general public" and asked the five labor representa-

tives likewise to name a sixth. In this manner the War Labor Conference Board was organized and reported to the Secretary of Labor on March 29, 1918, recommending *unanimously* the creation of a National War Labor Board to mediate and provide for arbitration of labor disputes and that "the Board in its mediating and conciliatory action and the umpire in his consideration of a controversy shall be governed by the following principles":

"There should be no strike or lockouts during the war.

"*Right to Organize*—1: The right of workers to organize in trade-unions and to bargain collectively, through chosen representatives, is recognized and affirmed. This right shall not be *denied, abridged, or interfered with* by the employers in any manner whatsoever.

"2. The right of employers to organize in associations or groups and to bargain collectively, through chosen representatives, is recognized and affirmed. This right shall not be *denied, abridged, or interfered with* by the workers in any manner whatsoever." * * *

(It should be noted that the foregoing principles state precisely the public policy written into Section 2, Paragraph 3 of the present Railway Labor Act.)

The complete statement of principles (from which the foregoing is quoted) was signed by the following representatives of employers, employes and the public:

(Employers)	(Workers)
Loyall A. Osborne	Frank J. Hayes
L. F. Loree	Wm. L. Hutcheson
W. H. Van Dervoort	Thomas J. Savage
C. E. Michael	Victor A. Olander
B. L. Worden	T. A. Rickert
Public:	
W. H. Taft	Frank P. Walsh

Both of the public representatives, William Howard Taft and Frank P. Walsh, made separate statements expressing their gratification at the conclusions reached, and in his statement, Mr. Walsh pointed out that:

> "Representing capital were five of the largest employers in the nation, but one of whom had ever dealt with trade-unions, advised and counseled by ex-President Taft, one of the world's proven great administrators and of the very highest American type of manhood." (Bulletin 287, Page 33.)

Thereupon on April 8, 1918, the President issued a proclamation creating the National War Labor Board (composed of the members of the War Labor Conference Board, with the single exception of the substitution of William H. Johnston for Thomas J. Savage in the workers group.) This proclamation provided that:

> "The principles to be observed and the methods to be followed by the national board in exercising such powers and functions and performing such duties shall be those specified in the said report of the War Labor Conference Board dated March 29, 1918, a complete copy of which is hereunto appended."

Decisions of War Labor Board.

A digest of the decisions of the War Labor Board is presented in Bulletin 287, page 51 to 115. Decisions enforcing the principle of the "right to organize" are listed on pages 51-64. The attitude of the board and the principles applied in this group of cases is well stated in the decision of the *New York Consolidated Railroad Company* case, signed by joint Chairmen William Howard Taft and Frank P. Walsh and reading in part as follows:

> "Right to Organize—The right of the workers of this company freely to organize in trade unions, or to join the same, and to bargain collectively is affirmed, and discharges for legitimate union activities interrogation of workers by officials as to their union affiliations, espionage by agents or representatives of the company, visits by officials of the company to the neighborhood of the meeting place of the organization

for the purpose of observing the men who belong to such unions, to their detriment as employees of the company, and like actions, the intent of which is to discourage and prevent men from exercising this right of organization, must be deemed an interference with their rights as laid down in the principles of the board."

This decision is particularly pertinent to interpretation of the Railway Labor Act in the present case, as shown by the following additional quotations from the opinion of the Board:

"The company seeks to avoid the charge of denying its workers the right to collective bargaining by pointing out that there is no opposition on the part of the company to membership in the organization known as the Brooklyn Rapid Transit Employee's Benefit Association. The employees claim, however, that this association is within the direct environment, if not actually under the control of the company itself.

The form of the benefit association seems to have been changed from time to time, but one feature which has persisted is that the president of the company has appointed the president of the association, and the president of the association has either himself conducted the elections or appointed persons to do so. It is claimed that this has never resulted in a suggestion of unfairness, but *where the issue is acute and a company-formed association is offered as a substitute for an association of the voluntary formation of the men, the slightest suspicion of an opportunity for unfairness on the part of the employer is itself a reason for questioning the usefulness of such an organization.*"

In concluding this brief review of the principles enforced by the War Labor Board, reference may well be made to what Bulletin 287 describes as "three outstanding cases in which there was resistance to the decisions of the Board. The first involved the Western Union Telegraph Company, which insisted on its right to decide whether employes should or should not "enjoy the privilege of membership in

trade unions of their choice. This question of discrimination against workers who affiliate themselves with trade-unions had led to innumerable industrial conflicts entailing vast losses of production to the country." (Bulletin 287, page 24.)

The War Labor Board "recommended that the Western Union desist from its practice of dismissing workers for joining the union. This the company refused to do. The President publicly requested the company to comply with the recommendation of the board, but without success. The telegraph employees again threatened strike. Thereupon all telegraph and telephone lines were taken over by the Government."

In the second case, employes of Bridgeport manufacturers refused to abide by an award. But under pressure from the President they finally obeyed; and under Presidential pressure striking employes were re-instated by the manufacturers.

In the third case the Smith & Wesson Arms Company refused to abide by a decision of the War Labor Board, requiring the company to cease discriminating against employes for joining labor unions, and "thereupon by direction of the President, the War Department took over the plant and operated it." (Bulletin 287, page 52.)

The significance of the decisions and principles applied by the War Labor Board in the interpretation of the Railway Labor Act may be summarized as follows:

Significance of War Labor Policies.

Representatives of employers, employes and the public *agreed* that, in order to maintain harmonious industrial relations and to provide for continuous, efficient operation of public services, during the war, it was necessary to insure to workers the right to organize themselves and to

designate their own representatives for purposes of collective bargaining, free from interference, influence or coercion of employers. In the only instances (two, out of the hundreds of cases considered by the War Labor Board) in which employers prevented the application of these principles, it was found necessary for the government to take over and operate their enterprises.

Shortly after the close of the war, the railroads were released from federal control and, as a part of the legislative problem to be solved, the Congress faced the necessity of providing some means for insuring that labor disputes should not interrupt the continuity of interstate transportation or impair its efficiency. Inevitably the experiences of the war period exerted a powerful influence upon public opinion and upon the resultant opinions of legislators as to appropriate measures to settle labor controversies. "All kinds of plans ranging from a policy *of laisses faire* to one in which the Government should fix the wages and determine the working conditions were brought forward by individuals and by groups of individuals." (Bulletin 303, page 79.)

Finally Title III of the Transportation Act, which concerned "disputes between carriers and their employes and subordinate officials" was worked out in conference between committees of the Senate and House as a compromise between opposing theories of regulation. Under this title the Railroad Labor Board was created, with power to hear and to decide disputes between railroad employers and employees, but without power to enforce any of its decisions. (See *Pennsylvania Railroad* cases, 261 U. S. 72 and 267 U. S. 203, hereafter discussed in this brief.)

Title III, Transportation Act of 1920.

Section 301 of this Act read as follows:

> "It shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing of any dispute between the carrier and the employee or subordinate officials thereof. All such disputes shall be considered and, if possible, decided in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute. If any dispute is not decided in such conference, it shall be referred by the parties thereof to the board which, under the provisions of this title, is authorized to hear and decide such dispute."

It might appear from a mere reading of the foregoing section by itself that an *enforceable legal duty* was imposed upon carriers and employees "to exert every reasonable effort" to settle disputes and to consider such disputes "in conference between representatives designated and authorized so to confer." But the Supreme Court decided in the *Pennsylvania Railroad* case last cited (267 U. S. 203), that—

> "The so-called mandatory language of Section 301 might, if that section were accompanied by a penalty for its violation, or some other means of compulsion *and there were not other provisions of the title to help its construction*, be given the force of a statutory obligation of the parties to the dispute." (P. 216.)

The court then pointed out that Sections 310, 311 and 312 provided measures of judicial enforcement and continued—

> "But when the other sections of the title are taken as a whole, they may be searched through in vain to find any indication in the mind of Congress, or any intimation that the disputants to controversies to be anticipated were in any way to be forced into compliance with the statute, or with the judgments pronounced by the Labor Board, except through the effect of adverse public opinion." (P. 216.)

It can hardly be questioned that Congress in passing Title III and establishing the Railroad Labor Board recognized that, as a pre-requisite to a successful administration of the law, railway employes should organize and designate their representatives for collective bargaining. Three members of the Railway Labor Board itself were to be appointed by the President from nominations made by the employes, in a manner prescribed by regulations of the Interstate Commerce Commission. As a practical matter, this required the Interstate Commerce Commission to provide for the making of nominations by the recognized railway labor organizations. Then the Railroad Labor Board was authorized to receive disputes "upon the application of *the chief executive of any carrier or organization of employes* or subordinate officials whose members are directly interested in the dispute," or "upon written petition signed by not less than one hundred unorganized employes or subordinate officials directly interested in the dispute." It was quite clear the law could not be effectively administered unless the greater part of 1,750,000 railroad employes were organized in some form suitable for taking collective action and assuming collective responsibility. Indeed the Supreme Court made the following pertinent statement in the first Pennsylvania Railroad case (261 U. S. 72, 83):

> "Again, we think that *this question of who may be representatives of employees*, not only before the board, but in the conferences and elsewhere, *is and always has been one of the most important of the rules and working conditions in the operation of a railroad*. The purpose of Congress to promote harmonious relations between the managers of railways and their employees is seen in every section of this act, and the importance attached by Congress to conferences between them for this purpose is equally obvious. *Congress must have intended, therefore, to include the procedure for determining representatives of em-*

ployes as a proper subject-matter of dispute to be considered by the board under 307. The act is to be liberally construed to effect the manifest effort of Congress to compose differences between railroad companies and their employees, and it would not help this effort, to exclude from the lawful consideration of the Labor Board a question which has so often seriously affected the relations between the companies and their employes in the past, and is often encountered on the very threshold of controversies between them."

The Railroad Labor Board itself recognized the supreme importance of the organization of railway employes in such a manner as to insure their representation by representatives duly designated and authorized to act, and "free" in every sense to represent fairly and effectively the interests of the employes. Therefore, in one of its *non-enforceable decisions,* the Labor Board took particular pains to state the principles upon which the representative character of spokesmen for the employes *could be* and *should be* determined.

In Decision 119 the Board referred back to the carriers and their employes disputes over agreements affecting rules and working conditions and called upon both parties to begin conferences "at the earliest possible date" and stated that "rules agreed to by such conferences should be consistent with principles set forth in Exhibit 'B' hereto attached."

Exhibit "B" consisted of sixteen principles of which the following are particularly pertinent:

"4. The right of railway employees to organize for lawful objects shall not be denied, interfered with or obstructed.

"5. The right of such lawful organization to act toward lawful objects through representatives of its own choice, whether employees of a particular carrier or otherwise, shall be agreed to by management.

"6. No discrimination shall be practiced by man-

agement as between members and non-members of organizations or as between members of different organizations, nor shall members of organizations discriminate against non-members or use other methods than lawful persuasion to secure their membership. Espionage by carriers on the legitimate activities of labor organizations or by labor organizations on the legitimate activities of carriers should not be practiced.

"7. The right of employees to be consulted prior to a decision of management adversely affecting their wages or working conditions shall be agreed to by management. This right of participation shall be deemed adequately complied with if and when the representatives of a majority of the employees of each of the several classes directly affected shall have conferred with the management.

"15. The majority of any craft or class of employees shall have the right to determine what organization shall represent members of such craft or class. Such organization shall have the right to make an agreement which shall apply to all employees in such craft or class. No such agreement shall infringe, however, upon the right of employees not members of the organization representing the majority to present grievances either in person or by representatives of their own choice." (See Decisions of Labor Board, Vol. II, pp. 91, 95, 96.)

The legal force of Decision 119 and its statement of principles (particularly principles 5 and 15 above quoted) came in issue before the Supreme Court in the two Pennsylvania cases heretofore cited. Both cases arose out of the action of the Pennsylvania Railroad in "using every endeavor to avoid compliance with the judgment and principles of the Labor Board as to the proper method of securing representatives of the whole body of its employes." (267 U. S. 203, 217.)

In the *first* case, a Federal District Court enjoined the Labor Board from publishing its opinion (in accordance with Section 313 of Title III), to the effect that the Pennsyl-

vania Railroad was violating its decision 119 and violating the principles announced in that decision. The Supreme Court held that the statute did "vest the Labor Board with power to decide how such representatives *ought* to be chosen, with a view to securing a satisfactory co-operation, and leaves it to both sides to accept or reject the decision." The court stated flatly that neither the claimed legal right of the employes to select their own representatives, nor the claimed legal right of the company to restrict them in their selection, was involved, stating: "This statute certainly does not deprive either side of the rights claimed." (261 U. S. 85, 84.)

In the *second* Pennsylvania Railroad case, employes sought an injunction against the Pennsylvania Railroad to prevent violation by the railroad of the principles announced by the Railroad Labor Board; or, in the language of the Supreme Court, the employes sought "to enforce, by mandatory injunction, a compliance with a *decision* of the Board not based on the *legal rights* of the parties, but on its judgment as to what legal rights the disputants should surrender or abate in the public interest and in the interest of each other, to maintain harmonious relations between them necessary to the continuance of interstate commerce and to avoid severing those relations as they would have the strict legal right to do. Such a remedy by injunction in a court, it was not the intention of Congress to provide." (267 U. S. 203, 216.)

The Supreme Court found in this case that the Pennsylvania Railroad "is seeking to control its employees by agreements free from the influence of an independent trade union, it is, so far as its dealings with its employees go, refusing to comply with the decisions of the Labor Board and is thus defeating the purpose of Congress." But the court held: "All these things it might do and remain within

its strict legal rights after it came fully into control of its railroad property subsequent to September 1, 1920. We do not think Congress, while it would deprecate such action, intended to make it criminal or legally actionable." (p. 217.)

In both the Pennsylvania cases, the Supreme Court recognized that the selection and recognition of accredited representatives of the employees was a matter of "primary importance" and that this had been recognized by Congress and by the Railroad Labor Board. But the court held that no mandatory duty had been imposed by statute upon railroads to forego the exercise of "strict legal rights" to seek to control the selection of, and actions of, supposed "employe representatives." There appeared to be little question in the mind of the writer of these unanimous opinions that a duty to "surrender or abate in the public interest and in the interest of each other" the exercise of such "strict legal rights" *could be imposed* by Congress. But the court held that Congress had not so legislated, and that principles, or rules of decision, announced by the Railroad Labor Board *could not be made the equivalent of statutory regulations,* because Congress had carefully made all the decisions of the Railroad Labor Board non-enforceable; and so the court held that both "preliminary" and "final decisions" could not be enforced. "The same sanction, therefore, of publication and public opinion, exists for them, and nothing else." (267 U. S. 203, 217.)

Repeal of Title III, Transportation Act of 1920.

It is unnecessary to review all the causes which brought about the repeal of Title III, Transportation Act of 1920, and the enactment of the present Railway Labor Act of 1926. But it is important to observe that the controversy between the Pennsylvania Railroad Company and its em-

ployes over the right of self-organization and designation of *bona fide* representatives of the employes, and the rulings of the Supreme Court therein, played a considerable part in creating a demand for a new law.

Also the operations of the Railroad Labor Board, prior to and during the shopmen's strike of 1922, brought the law of its creation under severe criticism from many sources. Public dissatisfaction was inevitable with a machinery provided to preserve industrial peace which produced the most far-reaching and destructive (in fact the only nation-wide) strike in the history of the railroads. Whether the law and its administrators bore any responsibility for the strike or not, it was at least evident that the law, as administered, did not prevent the strike.

The railway employes, a majority of whom have been long organized in the standard national unions, viewed the law as a complete failure as they observed the impotence of the Railroad Labor Board to protect the rights of these unions even to represent their own members. Many railroads were openly hostile to the law and were contemptuous of the authority of the Labor Board. Many disinterested representatives of the public also proclaimed the necessity for a revision of the law.

Secretary Herbert Hoover addressed the National Transportation Conference in Washington January 9, 1924 and urged as a part of a national policy "a basis of employer and employee relationship that will stimulate mutual responsibility as the first requisite to continuous service." In criticism of the Railroad Labor Board he said:

> "We have in this board confused four different functions in labor relationship. The board has in parts the machinery for collective bargaining, for arbitration, for conciliation, and judicial determination. Whatever change is made in the machinery to solve these relationships the changes should if possible be con-

structively developed by the railway employees and executives themselves, plus perhaps, the assistance of independent persons who represent the public interest."

The President of the National Industrial Traffic League at the same conference advocated repeal of Title III, stating: "We believe that private industry will be better off without the Railroad Labor Board." In fact, criticism of Title III was generally voiced by authoritative spokesmen for the public at that conference.

President Coolidge, in his annual message to Congress, December 6, 1923, had pointed out the dissatisfaction with the Labor Board and made this recommendation: "If a substantial agreement can be reached among the groups interested, there should be no hesitation in enacting such agreement into law."

The foregoing quotations are taken from hearings of the Senate Committee on Interstate Commerce on S. 2646, a bill for the repeal of Title III considered in the 68th Congress, First Session.

At the request of the organized railway employes, Senator Howell and Representative Barkley introduced this bill in the 68th Congress (S. 2646 and H. R. 7358). It is noteworthy that the "Association of Clerical Employes of the Southern Pacific Lines in Texas and Louisiana" (that is, the same company union that is involved in the present case) *opposed* the enactment of this bill, which provided, as does the present Railway Labor Act, that representatives of carriers and employes "shall be designated by the respective parties in such manner as may be provided in their corporate organization, or unincorporated association, or otherwise, without interference, influence or coercion exercised by either party over the self-organ-

ization or designation of representatives by the other." (Senate Hearings on S. 2646, p. 303.)

The Howell bill was reported favorably (with amendments) by the Senate Committee on Interstate Commerce on June 6, 1924. The corresponding Barkley bill was taken from the Committee on Interstate and Foreign Commerce to the floor of the House (by a vote of 194 to 181) and supported by a majority of the House on 16 roll calls on May 5, 1924, and 5 roll calls on May 19, 1924. (See Congressional Records for these dates.) But the 68th Congress adjourned without final action in either House upon the Howell-Barkley Bill.

Both the republican and democratic platforms written in their National Conventions in the same year (1924) called for revision of Title III of the Transportation Act. (See House Committee Report of February 19, 1926, on H. R. 9463; and Senate Committee Report of February 26, 1926, on S. 2306.) On December 3, 1924, President Coolidge, in his annual message, recommended legislation "affecting the labor sections of the Transportation Act."

In response to this pressure of public opinion, and "pursuant to the suggestions of the President, representatives of the railroads and representatives of their employes, after the adjournment of the last session of Congress, began conferences to ascertain whether or not there was a basis on which they could agree and present a plan for the adjustment of disputes." (Senate Report on S. 2306.) The conferences described were held between Committees representing the Association of Railway Executives (representing practically all the important railroads in the United States) and a Committee representing the twenty standard railway labor organizations, containing a large majority of the railway employes.

It is well to note that the Railroad Committee consisted of the following: W. W. Atterbury, of the Pennsylvania; J. H. Hustis, of the Boston & Maine; A. C. Needles, of the Norfolk & Western; W. L. Mapother, of the Louisville & Nashville; L. W. Baldwin, of the Missouri Pacific; Hale Holden, of the Chicago, Burlington & Quincy; Carl R. Gray, of the Union Pacific; Charles Donnelly, of the Northern Pacific; E. E. Loomis, of the Lehigh Valley; W. R. Scott, of the Southern Pacific; C. H. Markham, of the Illinois Central. With the foregoing, P. E. Crowley of the New York Central and Daniel Willard of the Baltimore & Ohio were associated in an advisory capacity. According to Colonel Alfred P. Thom, General Counsel for the Association of Railway Executives, the drafting of new legislation "was taken up in the most representative and authoritative way by the leading railway executives of the country, and they participated in this movement." (House Hearings on H. R. 7180, January 29, 1926, page 109.) As a result of these conferences, a bill was drafted and approved by these authoritative representatives of *the railroads and their employes* and introduced in Congress by Senator Watson, Chairman of the Senate Committee on Interstate Commerce, and Representative Parker, Chairman of the House Committee on Interstate and Foreign Commerce, on January 7, 1926. (S. 2306 and H. R. 7180.) This Watson-Parker bill (which was simply a revision of the Howell-Barkley bill, which had been considered at the previous session) was passed by the House (as H. R. 9463) without substantial amendment on March 1, 1926, by a vote of 381 to 13; and was passed without further amendment by the Senate on May 11, 1926, by a vote of 69 to 13. (See Congressional Records of these dates.) It was approved by the President and became a law on May 20, 1926 under the title of the "Railway Labor Act."

The reports of the Committees of both Houses of Congress laid emphasis on the fact that the bill under consideration "represented the agreement of railway managements operating over 80 per cent of the railroad mileage and railroad organizations representing an overwhelming majority of the railroad employes." (House Report on H. R. 9463.) The Senate Report stated that when the bill was submitted to a meeting of the Association of Railway Executives, 52 roads representing 167,915 miles favored it; 20 roads representing 36,564 opposed it; 32 roads representing 18,134 miles were absent. (Senate Report on S. 2306.)

Since a few roads opposed the enactment of the Railway Labor Act, it is well to point out in the present case that the Southern Pacific Lines (which include the present petitioner) *approved* the bill and that their late President, W. R. Scott, was a member of the Conference Committee responsible for its drafting.

Conclusions from Historical Review.

It has been apparent from the first legislation passed by Congress for the settlement of railway labor disputes (in 1888) that any program and legislation designed to produce harmonious industrial relations *must provide* for selection of representatives by employes so that they may engage in, and be responsible for, the results of collective action. Prior to the war, legislative acts to encourage conferences, to furnish aid by government mediators in bringing about agreements, and to provide for voluntary arbitration under government sanction, had proved fairly successful measures for settling labor disputes and for preventing interruptions of interstate commerce as a result of such disputes. Then, during the war period there developed an almost universal use of government tribunals to arbitrate disputes between employers and employes, in-

cluding the creation of an extensive machinery for handling labor disputes in the National Railroad Administration.

After the end of the war, despite a strong reaction against compulsory or government arbitration, legislation was enacted to provide for the decision of unsettled labor disputes by a federal board. But no compulsion, save that of public opinion, was provided for the enforcement of the decisions of the Railroad Labor Board. Nevertheless, the right of employes to organize and to designate representatives freely in order to bargain collectively had been universally recognized during the war, and it was evident that absolute freedom of employe representation was essential to the successful operation of the Railroad Labor Board, to insure the satisfaction of the employes and to furnish leverage for moral pressure upon them to obey the decisions of the Board.

But the intention of Congress not to exercise compulsion upon carriers or employes to obey the decisions of the Board naturally led the Supreme Court to interpret the law as not *requiring* railroad employers to permit employes to organize freely, and as not giving the employes any enforceable *legal right* to organize and to designate their representatives free from the interference, influence or coercion of their employers. This essential weakness in Title III of the Transportation Act, one of the prime causes of the failure of the act, inevitably produced demands for new legislation to provide new guarantees of this essential right of the employes. Thus when the employes drafted the Howell-Barkley bill, they wrote into it an imperative mandate that representatives of carriers and employes should be designated "without interference, influence or coercion exercised by either party over the self-organization or designation of representatives by the other."

Chairman Hooper of the Railroad Labor Board, although bitterly opposing the enactment of the Howell-Barkley bill, testified that Title III should be amended in regard to employe representation so that "the carrier should not be permitted to evade the law by conferring with somebody else under the pretense that it is conferring with the employes' representatives. If this is done, and it has been done, the very vitals of the law are cut out and cast away." (Senate Hearings on S. 2646, p. 257.)

It followed inevitably from the forty years' experience in railway labor disputes, which we have briefly reviewed, that when the Howell-Barkley bill was revised in conferences between the railroad managers and the representatives of their organized employes, this declaration of the right to organize and this imposition of a duty upon each party to refrain from interfering with the self-organization of the other party, was preserved and was written into the agreed bill, which was then passed by both Houses of Congress without the slightest change in this particular provision.

It is now appropriate to take up an analysis of the Railway Labor Act, reading its careful wording as the product of forty years' legislative effort to provide a satisfactory means for adjusting railway labor controversies. If the language of the Act itself fails to provide a clear and unambiguous expression of the legislative intention, extraneous evidence may then be sought for further aid in interpretation. We believe, however, that the Act itself provides an adequate basis for its correct interpretation.

Judicial Rules for Determining Legislative Intention.

The well-settled rules for the construction of Acts of Congress may be summarized as follows:

1. It is the duty of the court to give effect to the

intent of Congress primarily by giving the words used "their natural significance." (*Ozawa* v. *United States*, 260 U. S. 178.)

2. Significance should be given to every word in a statute, so that nothing shall be "superfluous, void, or insignificant." (*Ex parte Public National Bank*, 278 U. S. 101.)

3. The history of legislation will shed light on the intention of Congress. (*Karnuth* v. *United States*, 279 U. S. 231, 243.)

4. "Where doubts exist and construction is permissible, reports of the Committees of Congress and statements by those in charge of the measure and other like extraneous matter may be taken into consideration to aid in the ascertainment of the true legislative intent." (*United States* v. *Missouri Pacific Railroad Company*, 278 U. S. 269, 278.)

It should be pointed out that the last cited case with its extensive notes provides a small encyclopedia of the law upon the interpretation of statutes.

Applying this law, we arrive at the same construction of the Railway Labor Act, either by (A) reading the Act alone; or (B) after resorting to appropriate "extraneous matter" to ascertain the "true legislative intent."

POINT I-A.

The intention of Congress to establish legal rights and duties in the Railway Labor Act—is revealed clearly in the Act itself.

The legal obligations of the petitioners and the legal rights of the respondents, which were violated in the present case, are set forth in Section 2 of the Railway Labor Act in the following language:

"Sec. 2. First. It shall be the duty of all carriers, their officers ,agents, and employees to exert every rea-

sonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second: All disputes between a carrier and its employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purposes of this Act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other.

Fourth. In case of a dispute between a carrier and its employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: Provided (1), That the place so specified shall be situated upon the railroad line of the carrier involved unless otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: And provided further, that nothing in this paragraph shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Fifth: Disputes concerning changes in rates of pay,

rules, or working conditions shall be dealt with as provided in section 6 and in other provisions of this Act relating thereto."

Section 2, read as a whole, shows a clear purpose on the part of Congress to provide for the maintenance of harmonious labor relations in interstate commerce, *through the establishment of employment relations by contracts engendered through collective bargaining.* It is the essence of a contractual obligation that it shall be *voluntarily* assumed.

"Whatever may be the advantages of 'collective bargaining' it is not bargaining at all in any just sense unless it is voluntary on both sides.

* * * * *

"The case involves no question of the rights of the employes. Defendants have no agency for plaintiff's employes, nor do they assert any disagreement or grievance in their behalf. In fact, there is none; but if there were, defendants could not, without agency, set up any rights that employes might have."

Hitchman Coal & C. Co. v. *Mitchell*, 245 U. S. 229, 250, 253.

A collective contract, or any contract wherein a party is represented by an agent, *has no force unless the agent is duly authorized to make the contract and unless the agent acts free from the influence or coercion of the other contracting party.*

"It is a fundamental principle that the relation of agency can exist only by the will of the principal and with the consent of the agent. In other words, as agency ordinarily results from one form of contract, there must, in general, be a contract of employment, express or implied, which must possess the essential elements of their contract."

2 Corpus Juris, 432.

"A principal is not bound by a contract made in his behalf if, without his knowledge and consent, the

agent acts in furtherance of his individual interest and the other party to the contract has notice of the agent's breach of trust."

2 Corpus Juris, 837.

"Where an agent without the full knowledge and consent of his principal, represents the adverse party in a transaction, his contracts relating thereto are voidable at the option of the principal."

2 Corpus Juris, 838.

"*A fortiori* the principal may avoid contracts made by the agent as the result of fraud and collusion between the agent and the third party; and the payment of a secret commission, bribe or gratuity to the agent by the third party as an inducement for entering into contractual relations on behalf of his principal, or an agreement to pay such commission is such collusion as entitles the principal to avoid the contract."

2 Corpus Juris, 839.

Therefore, in seeking to have employment relations harmoniously established and maintained in interstate commerce on the basis of contract, Congress not only made it the *duty* of the parties to make every reasonable effort to make and maintain agreements, but also made it the *duty* of carriers and employes to confer through "representatives designated and authorized so to confer," and made it the *duty* of both parties to refrain from exercising any influence over the selection or action of the agents of the other party, which would result in fraudulent, nonenforceable contracts.

It must be assumed that members of Congress, like all other persons familiar with industrial relations and with controversies between employers and employee organizations on the railroads and elsewhere, know that the refusal of employers to "recognize" employee organizations and their representatives, and to confer with them, has been a most prolific source of controversy and a frequent cause

of strikes. The historical background presented in this brief, as in the committee hearings and debates of Congress, shows that members of Congress understood thoroughly the vital importance of protecting the right to organize. The Railway Labor Act was clearly written upon the theory that if the parties could be legally obligated, at least to meet and to discuss their differences, and if then a machinery of government mediation and opportunity for arbitration could be provided, there would be every reason to expect that most, if not all, labor disputes would be peaceably determined. The entire efficacy of the Act, therefore, would depend upon providing assurance at the outset that each party *could compel a consideration* of its position by the other party *and could be assured* that, if an agreement were reached, both parties would be legally obligated to perform it because the validity of the contract made by duly authorized representatives could not be challenged.

Therefore, in addition to the provisions of the first three paragraphs of section 2, it was provided in the fourth and fifth paragraphs that conferences must be held in regard to the two large classes of disputes commonly arising on the railroads. The fourth paragraph covered disputes "rising out of grievances or out of the interpretation or application of agreements, concerning rates of pay, rules or working conditions." The fifth paragraph covered "disputes concerning *changes* in rates of pay, rules or working conditions."

A mere reading of the provisions of this section of the Act alone shows a clear intent on the part of Congress to make sure that the terms and conditions of employment on the railroads shall be fixed by contract and that such contracts shall not be applied, interpreted or changed, except in conjunction with an opportunity for the employees concerned to be heard and to be represented through duly authorized

agents. The obligations which are written into the law are unmistakable. The intent of Congress to impose such obligations is clearly manifested in the repeated use of the word "shall," which stands in marked contrast to the use of the permissive word "may" in such provisions as that in section 5, which provides that either party to the dispute *may* invoke the services of the Board of Mediation, or the provision of section 7 that a controversy "*may* by agreement of the parties to such controversy be submitted to the arbitration of a board of three." When the subsequent sections of the Railway Labor Act are examined to find whether Congress had any intention to make legally enforceable these rights and duties defined in section 2, we find that the whole machinery devised by Congress for the settlement of disputes becomes futile and ridiculous, unless there is a legally enforceable right in the employes to select their own representatives without coercion from the other side and to obtain consideration of their interests through conferences between their duly authorized representatives and the representatives of management.

When each section following the statement of duties in section 2 is considered the necessity for the enforcement of the previously expressed obligations becomes even more obvious.

Section 3. "Boards of adjustment shall be created by agreement." The agreement shall be in writing stating the groups of employes covered and stipulating "that decisions of adjustment boards shall be final and binding on both parties to the dispute: and it shall be the duty of both to abide by such decisions." Such adjustment boards could not be created except through collective bargaining and the decisions could not possibly be made "binding" on a number of employees unless the tribunal itself had been established by agreement of the employees, which agreement

could only be *legally enforceable* if made by duly authorized representatives.

The paradoxical phrase "shall be created by agreement" was specifically explained as *not* meaning that the *making* of an agreement could be judicially compelled, but as a mere expression of an agreement already made by the employers and employes who sponsored the bill. (House Hearings on H. R. 7180, pp. 13, 82.)

Section 4 and Section 5 provide for the creation and functioning of a board of mediation. This board can only settle a dispute in two ways: (1) by bringing the parties into an agreement, or (2) by bringing them into an agreement to arbitrate the dispute. Obviously if a government board were to spend its time trying to get an agreement between representatives of management and representatives of employes, unless the employe representatives were genuine and duly authorized representatives, the whole procedure would be a waste of time and money and make the government ridiculous. What would be the value of getting an agreement signed by the representatives whom the employes could properly repudiate as not having been chosen by them, or as being under the influence of, or corrupted by, the other side? Such an agreement would be more likely to produce a strike, than to settle one. Certainly a strike, (which, in violation of a contract, might be held to be for an *unlawful* purpose, or *unlawfully* conducted) would be entirely lawful, in fact an admirable procedure when used to protect men against being defrauded of their rights, through contracts purporting to bind them, which had been signed by agents not authorized to represent them, or fraudulently induced to betray their principals.

It may be appropriate to point out that in the Debs case the Supreme Court sought to teach to railway labor "a

lesson which cannot be learned too soon or too thoroughly that under this government of and by the people the means of redress of all wrong are through the courts and at the ballot box." (158 U. S. 565, 599.) It is now suggested, when Congress (chosen through the ballot box) has written a law declaring that it is the duty of railroad employers and employes to settle their disputes through making contracts and that it is the duty of employers to deal with *bona fide* employe representatives and to withhold any corrupting or coercive influence which might deprive the employes of such bona fide representation—and when an employer has deliberately sought, (as found by the District Court in the present case) to have "a vote on both sides of the table" —that the courts should deny to the employes any "means of redress" of this wrong!

Let us review briefly the facts in the present case as found by the District Court and the Circuit Court of Appeals. The Brotherhood had represented the clerical employes of the Southern Pacific lines both East and West for several years without challenge. A wage increase was sought on the lines West and, through the services of the United States Board of Mediation, an arbitration agreement was obtained and the arbitrators awarded the clerks on the lines west of El Paso an increase of 5 cents per hour. The Brotherhood sought an increase likewise on the lines east of El Paso and, failing in conference, invoked the services of the United States Board of Mediation. Whereupon, the railroad officials knowing they "could not expect any more favorable decision in case this matter went to arbitration" found themselves facing an inevitable "increased payroll cost of approximately $340,000 per annum." So they adopted the program of reviving the "dormant" company union, through which they believed they could make a settlement "at a cost not to exceed $75,000 per annum." These facts

were not only found by the District Court, but clearly revealed in the letter of the vice-president of the railroad company to the president, which appears in the record. (Rec., 773.)

It is quite apparent that if a railroad can thus wilfully and flagrantly violate the duties imposed in the Railway Labor Act, the entire machinery provided by Congress for settling railway labor disputes can be made useless. *Bona fide* organizations of employes will be forced to stand idly by, to invoke the services of federal mediators in vain, to offer to arbitrate in vain, while railroad managers enter into fraudulent contracts with *mala fide* representatives of employes, purporting to fix the wages and working conditions of those who have not even been given an opportunity to be heard in protest. Inevitably, so long as *bona fide* labor organizations exist, they will not passively tolerate such impositions on their memberships. With no other resource open to them, strikes will be inevitable.

Since the major purpose of Congress in passing the Railway Labor Act was to provide a machinery to prevent strikes, and make it unnecessary for railway employes to resort to strikes, how can the legislation enacted be construed to have declared legal duties and rights regarded as essential to prevent strikes, without the intention on the part of Congress that such rights and duties should be legally enforceable? The District Court naturally held:

> "It is the duty of this court, wherever possible, to hold Acts of Congress virile rather than sterile, constitutional, rather than unconstitutional, and, where a right is claimed under an Act of Congress, to give it effective protection, especially where those who contest this right do so on arbitrary or interested grounds."
>
> *Brotherhood of Railway Clerks* v. *T. & N. O. Railroad Company*, 25 Fed. (2nd) 873.

We might add to the above statement of the District Court that it is not only appropriate to hold Acts of Congress "virile rather than sterile," but it is also appropriate to hold Acts of Congress intelligent rather than stupid. The courts need not assume that all legislative acts are expressions of profound wisdom. Legislators have human weaknesses and they make human mistakes. But when a court is asked to construe an Act as the impotent product of legislative incompetence and when the alternative is presented that the Act may more naturally be construed as the potent product of legislative competence, the judicial duty would appear clear.

The indefensible attitude of the petitioners is quite clearly revealed in the following quotation from their brief (page 78):

> "The government and public are not concerned with who shall act as representatives, but in what they shall do after they are chosen. The public is *not concerned* in whether the Association or the Brotherhood is chosen to talk for the employes, *but only in having whoever is chosen reach agreements which will keep the peace.*" (Italics ours.)

Counsel for petitioners may well be asked to explain how "agreements which will keep the peace" can be reached between a railroad and alleged representatives of the employes who do not, in fact, represent the employes and whose pretended agreements will necessarily be repudiated by the employes. How would it "keep the peace" on this railroad system for this railroad and its officials to "deliberately set at naught both the legislative and the judicial power of the United States" by going about "to arrange it so that the railroad would be in a position of surely having a vote on both sides of the table, its own side and that of its employes" * * * as found by the District Court in this case, which finding was approved by the Cir-

cuit Court? The public is certainly concerned with the making of agreements which will keep the peace. The public interest is certainly not served by the making of agreements which will create hostility and conflict.

Continuing with an analysis of the Act:

Section 6 provides an important restriction upon changing rates of pay and rules without adequate notice and opportunity for conference and provides specifically that such changes *shall not be made* where notice has been given, or conferences are being held, or the services of the Board of Mediation have been requested by either party, until the controversy has been finally acted upon. The plain purpose of Congress in making these mandatory requirements concerning conferences was to prevent the arbitrary and sudden change of wages and rules without notice or opportunity for discussion, or opportunity for government mediatory aid.

The clear object of this section is to protect interstate commerce from such interruptions as have occurred frequently in the past from strikes brought about through sudden and arbitrary changes in conditions, without even giving an opportunity for discussion to those vitally affected. The statute created a right in the employes to a reasonable participation in the determination of conditions affecting their lives and their property in a most vital manner. Congress did not provide there "*should*" be notice and conference, which would be the appropriate language to express a moral obligation, but Congress provided there "shall" be such conference and provided that during and following the procedure of the Act, rates of pay and rules "*shall* not be altered."

Sections 7, 8 and 9, provide for arbitrations and when these arbitration provisions of the Act are considered the necessary intent of Congress to provide for duly author-

ized representation of the parties as an *enforceable* right becomes clearly visible. Arbitration is not made compulsory, but if an arbitration is entered into, *the contract of arbitration is made enforceable and the award is made enforceable.* Since the government is to pay a considerable part of the expenses of arbitration, it must be clear that Congress intended that the contracts of arbitration and the arbitration awards should be, not only technically enforceable, but *effectively* enforceable; that is that the employes, as well as the employers, should be *legally* bound. Yet no employe could be bound by a contract not made for him by a duly authorized agent.

If the Board of Mediation, for example, in case of a dispute over wages between firemen and one or more railroads, should induce the making of an agreement for arbitration, but, instead of obtaining such an agreement between duly authorized agents, should obtain an agreement signed by three or four firemen not authorized to represent their fellow employes, the sole result of the arbitration conducted under federal authority at governmental expense and enforceable in the federal courts, would be to provide the terms of a contract only enforceable against the three or four men who signed as employes and not in any way enforceable against the great body of employes affected.

Section 9 of the Act provides that an award may be impeached, if it does not conform to the requirements laid down in the Act or the stipulations of the agreement to arbitrate, or if the proceedings were not in conformity with the Act, or if a party practiced fraud or corruption which affect result of the arbitration. (Section 9, 3rd (a) (b) (c).) It must be evident that if it were sought to enforce an award against employes when the agreement to arbitrate had not been signed by their "duly accredited representatives," as provided in Section 8, Clause d, the

award could either be impeached or at least would be held not enforceable against such employes. Yet in the principal case wherein the enforcement of an arbitration award, under the provisions of the Railway Labor Act, has been contested, the Circuit Court of Appeals of the Seventh Circuit sustained the award. *Atchison T. & Santa Fe Railway Company* v. *Brotherhood of Locomotive Firemen*, 26 Fed. (2nd) 413. A contract between "duly accredited representatives" was enforced.

In the opinion just cited, the Circuit Court of Appeals held that, "Sections 7, 8 and 9 may be described as the heart of the Act and deal with 'arbitrations.'" The court also held: "It is apparent that the paramount purpose (of the Act) was to provide means for the prompt settlement of disputes between a carrier, or group of carriers and their employes." And the court also said: "We must assume that Congress was providing a workable (not a theoretical) means for settling disputes."

It will be noted that the provision for arbitrations which would result in *enforceable* awards was a complete reversal of the policy adopted in the Transportation Act, which provided for arbitrations which did *not result* in enforceable awards. Therefore, to interpret the duties and obligations imposed in the present Act as being "substantially identical" with those in the former act is simply to misinterpret and to misread the clear *change of policy* adopted by Congress.

The Labor Board was free to decide who were appropriate representatives of the employes. Their authority did not arise out of a private contract, but a Federal Board of Arbitration under the present Act derives its authority from the arbitration agreement, which is a fraudulent contract unless those signing it are *bona fide* representatives

of the employes whom they assume to bind. The Labor Board could decline to decide a dispute in the absence of *bona fide* employe representation. A Board of Arbitration must decide a dispute between those signing the agreement to arbitrate and cannot bring other parties into the case.

Before leaving the arbitration section, attention should be specifically called to the proviso in Section 7, Paragraph first, which reads as follows:

> "Provided, however, that the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise."

In this proviso the congressional intention is made clear to impose legal obligations upon carriers and employes by the terms of the Railway Labor Act.

Prior to Section 7 these obligations had been frequently expressed in mandatory language. The parties had been obligated "to exert every reasonable effort to make and maintain agreements." They had been obligated to consider and, if possible, decide disputes in conference. They had been obligated to designate representatives "without interference, influence or coercion exercised by either party over the self-organization or designation of representatives by the other." They had been obligated to specify a time and place of conference when notified of a desire to confer by the other party. (Section 2.) They had been obligated to give written notice of intended changes in wages or rules and to confer upon the same and not to change them "until the controversy has been finally acted upon." (Section 6.)

Then in the writing of the law came Section 7, providing that a controversy might be submitted to arbitration. Then it was found necessary to put in a proviso to the effect that "the failure or refusal of either party to submit a contro-

versy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise." Why was this proviso necessary if no legal obligation had been imposed upon any one by the Act? Quite obviously it was feared that a refusal to arbitrate might be construed to be a violation of the duty "to exert every reasonable effort to make and maintain agreements," or to decide disputes "if possible;" or it was feared that in some way the "legal obligations" written in the Act might be so construed as to make a failure to arbitrate an unlawful act and thus the Act might be held to provide in effect for compulsory arbitrations, which representatives of the carriers and employes, alike, opposed. It takes a strained construction of this Act to hold that it imposes no legal obligation, when in one section, Congress was very careful to write that a failure to follow the statutory procedure there provided should not be construed as a violation of "any legal obligation" written elsewhere in the Act.

Section 10. Finally we come to the provisions of Section 10, wherein it is provided that if a dispute "be not adjusted under the foregoing provisions of the Act," and should threaten to interrupt commerce, an emergency board may be created by the President, and the Act provides:

> "After the creation of such board and for thirty days after such board has made its report to the President, no change except by agreement shall be made by the parties to the controversy in the conditions out of which the dispute arose."

It can hardly be contended that this language, viewed either alone or in connection with the discussion of the law during its passage through Congress, does not create the basis for the invocation of the powers of a court of equity to compel compliance with the mandatory duty imposed.

Yet how could a court determine who are the "parties to the controversy," except by determining who the individual participants represent?

Careful consideration of Section 10 will demonstrate that the present petitioner is curiously blind to its own interests and the interests of all other railroads in arguing that "the judicial department of the government was intended to have no hand" in the enforcement of this statute. Petitioners assert: "The only provision for judicial intervention is found in the Seventh Section where an arbitration decree may be enforced by court process." (Petitioners' brief, page 76.)

Yet here in Section 10 is a provision limiting the right to strike, in regard to which the Senate Committee on Interstate Commerce reported (in recommending the passage of this Act) as follows:

> "The Committee was informed that in agreeing to the emergency board, the representatives of the employes had gone further than they had ever gone before in the history of their organizations."

To like effect the House Committee on Interstate and Foreign Commerce reporting the same bill with a recommendation of passage stated:

> "It is also highly important to point out that during the period of investigation and for thirty days thereafter the parties to the controversy are bound under the proposed law to maintain unchanged the conditions out of which the dispute arose, thereby assuring the parties and the public that the emergency board will have the full and unembarrassed opportunity to exert its authority and fulfill its important function."

There is no possible question that Congress intended to make the provisions of Section 10 enforceable to the extent of authorizing any court of competent jurisdiction to restrain either party to the controversy from changing the

existing status during the sixty-day period provided for the emergency board.

The Senate Committee report answered the objection that Section 10 should be made still more explicit by the following statement:

> "The objection that the bill should in express terms forbid strikes during the period of the inquiry by the emergency board and for 30 days thereafter is successfully met, in the opinion of the committee, by the contention that in forbidding a change in the conditions out of which a dispute arose, one of which and a very fundamental one is the relationship of the parties, it already forbids any interruption of commerce during the period referred to; and if strikes were in express terms forbidden for a given period there might be an implication that after that period strikes to interfere with the passage of the United States mails and with continuous transportation service might be made legal. In the opinion of the committee, this possible implication should be avoided."

It will be observed that all the arguments advanced by present petitioners against finding a Congressional intention to make the provisions of Section 2 enforceable apply with equal force to Section 10. A mandatory duty is imposed on the parties that no change in conditions *"shall be made."* But there is no penalty for a violation of this Section written in the law. There is no reference to judicial enforcement. Presumably petitioners would argue that only an "abstract right" is here created. Yet this "abstract right" might be the means of preventing interruption of commerce, costing railroads millions of dollars and imposing enormous losses upon the public.

Is it possible to assume that petitioners, as responsible railroad operators, desire to have the Supreme Court of the United States hold that none of the provisions of the Railway Labor Act are enforceable, except in the case of arbitration where specific reference is made to judicial enforce-

ment? Is it possible that petitioners desire to have this law laid down to govern the courts of the United States? Congress has imposed by statute duties upon both railroads and their employes engaged in interstate transportation which, in the reasonable judgment of Congress, must be fulfilled in order to prevent interruptions of commerce greatly injurious to the public interest.

A series of correlative rights and duties are imposed in mandatory language in a comprehensive legislative act "in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employes thereof." (Section 2, Paragraph first.) And if those duties imposed on the employes (such as those set forth in Section 10) were violated, it is certain that the railroads affected would seek in the equity courts of the United States to prevent such a violation. Yet the present petitioning railroad is now seeking to induce the Supreme Court of the United States to construe the Act in such a manner as to deny to the equity courts jurisdiction to prevent such a violation of the duties imposed by this law. Certainly they cannot ask the court to hold that the law imposes *duties* only on the employes and grants *rights* only to the employers. But in a blind effort to maintain the unjust position that a duty imposed by Congress and clearly written into a law can be violated because no penalty for violation has been provided in the law, counsel for petitioners are urging the court to sustain a construction of the law grossly detrimental, not only to the public interest, but to the interests of the railroads themselves.

The attention of the court should be called particularly to one of the few amendments to the bill as introduced which was made by the Committees of both Houses of Congress, in the last paragraph of Section 9, which amendment

is explained in the report of the Senate Committee in the following language:

> "As to paragraph (8) of section 9, it was urged that it should be clarified so as certainly to apply only to the use of legal process against an individual employe and so as not to apply to combinations or conspiracies between several employes, or groups of employees, to interrupt interstate commerce.
>
> "It was frankly stated by the advocates of the bill, both those representing the carriers and those representing the employes, that the purpose of the paragraph was to deal merely with individual employes, to express only the constitutional right of individuals against involuntary servitude, and was not intended to deal with combinations, conspiracies, or group action. This construction has been made abundantly clear by an amendment to the bill by which the word 'individual' has been inserted before the word 'employe' wherever the latter word appears in the paragraph."

It is evident that Congress desired specifically to preserve, unimpaired, the power of the courts to enjoin combinations or conspiracies of employes to violate the legal obligations imposed by this Act. We may properly ask petitioners whether it is their position that the powers of the courts should be exercised only to restrain conspiracies of employes to violate their legal obligations, or whether they will agree that even-handed justice must provide for the exercise of the same judicial powers to restrain conspiracies of employers to violate their legal obligations?

It must be apparent, upon an intelligent reading of the entire Act, that the machinery provided for composing differences between employers and employes engaged in interstate transportation is grounded entirely upon the theory of maintaining peaceful industrial relations through agreements between carriers and their employes, which, in order to have any validity and effectiveness, must be based upon actual and bona fide representation of employes

through representatives freely chosen and given a full and free opportunity to enter into collective bargains in behalf of those whom they have been duly authorized to represent.

In view of the clear language and well-defined purpose of Congress, there is no need to seek sources of interpretation extraneous to the Act itself, although it is entirely appropriate in reading the language of the Act to give consideration to the history of industrial controversies on the railroads and the efforts of the federal government to provide means for preventing interruptions of commerce. This history has been written in the previous Acts of Congress, and in the decisions of the courts, and in the events of the last fifty years of political and economic history so well known that they come within the field of judicial notice. This history has been previously outlined in this brief with references to authoritative sources of detailed information.

POINT I-B.

A congressional intention to create legal rights and duties need not be evidenced by penalties for their violation or a specific grant of judicial jurisdiction to enforce them.

To support their contention that Congress did not intend to create legally enforceable rights and duties, counsel for petitioners urge that there are no penalties provided in the Act for violation of the duties and obligations which it imposes. This contention has no support in the established law. The Circuit Court of Appeals stated the law briefly in its opinion in this case in the following language:

> "The violation of a duty created by statute, resulting in damage to one of the class for whose benefit the duty was imposed confers a right of action upon

the injured person, though the statue makes no provision as to a remedy for such a wrong. *Marbury* v. *Madison*, 1 Cranch 137, 163; *De Lima* v. *Bidwell*, 182 U. S. 1, 176; 1 Corpus Juris 951. The language of the provision in question is inconsistent with the existence of intention to leave a carrier free to interfere, in the way charged in the bill, with collective action by members of a group of its employees in selecting their representative for purposes of the Act."

In addition to the cases cited in the foregoing opinion, we refer to the following:

In *Peck et al* v. *Jenness, et al.*, 7 Howard, 612, 623, the court said:

> "A legal right without a remedy would be an anomaly in the law."

In *Russell* v. *Clark's etc., et al.*, 7 Cranch, 69, 92, the court said:

> "If an act, in itself immoral, in its consequences injurious to another, performed for the purpose of effecting that injury, be not cognizable and punishable by our laws, our system of jurisprudence is more defective than has hitherto been supposed."

In *Monongahela Bridge Co.* v. *U. S.*, 216 U. S. 177, 195, the court said:

> "Suffice it to say that the courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy consistent with the law, for acts whether done by government or by individual persons, that violated natural justice, or were hostile to the fundamental principles devised for the protection of the essential rights of property."

In 10 R. C. L. Section 9, (Equity) pp. 263-264:

> "While courts of equity, in the exercise of their power to render extraordinary relief, are restrained by fixed rules and settled principles, a want of jurisdiction is not to be inferred from the novelty of the question alone. In other words, it is no objection to

the exercise of jurisdiction that in the everchanging phases of social relations a new case is presented and new features of wrong are involved where merely novelty in incident, not in principle, appears. Otherwise gross injustice, under the guise of forms of law, might be perpetrated. So, while courts of equity may not assume a jurisdiction which is non-existent, they may amplify remedies or avail themselves of new remedies and unprecedented orders to meet an emergency, when such are based on sound principles and calculated to afford necessary relief without imposing illegal burdens. And it is in this sense that the words of Chancellor Cottenham to the effect that it is the duty of a court of equity to adapt its practice and course of proceeding to the existing state of society, and not, by too strict an adherence to forms and rules estabtablished under different circumstances, to decline to administer justice and enforce rights for which there is no other remedy, are so often quoted with approval. Also it is in this sense, namely, in the adaptation of its old and well recognized rules to new cases, and in the application of its highly elastic and more flexible processes and procedure to the changing emergencies of increasingly complex business relations as contradistinguished from the fixed and settled principles of equity themselves, that the jurisdiction of equity may be said to be constantly growing and expanding."

In *Union Pacific R. Co.* v. *Chicago, R. I. & P. R. Co.*, 163 U. S. 564, pp. 600-601, the court said:

"It must not be forgotten that in the increasing complexities of modern business relations, equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them. As has been well said, equity has contrived its remedies 'so that they shall correspond both to the primary right of the injured party, and to the wrong by which that right has been violated' and 'has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition in which new primary rights and du-

ties are constantly arising and new kinds of wrongs are constantly committed.'"

In *Memphis & L. R. R. Co.* v. *S. Exp. Co.*, 117 U. S. 1, the express company sought to restrain the railway companies from refusing to carry matter on the terms of contracts which had expired, which, the court held, could not be done and it was said:

> "The legislature may impose a duty and when imposed, it will, if necessary, be enforced by the courts; but, unless a duty has been created either by usage or by contract, or by statute, the courts cannot be called on to give it effect."

In *Lehigh Valley R. Co.* v. *Bd. of Pub. U. Comrs.*, 278 U. S. 24, 40, the court said:

> "If for any reason a remedy should not be available, or be inadequate, it would seem to be clear that resort then might be had to a court of chancery. In *Allen* v. *Distilling Co. of America*, 87 N. J. Eq. 531, 100 Atl. 620, the court of chancery in New Jersey used this language:
>
> "'So long as courts of equity are to serve the purpose of the creation of the court of chancery of England,—and in this state the court of chancery is the successor, in all that such terms implies, of that court,—jurisdiction must depend only upon the existence of, or a threatened wrong, and the absence of an adequate remedy at law. * * * Due to our habit of endeavoring to find decided cases to fit each situation, we too often overlook the fundamental reasons for the creation or evolution of the court. It received no grant of express powers nor were express duties imposed upon it. The law courts were left to deal with the violation of all rights for which they could give an adequate remedy. The duty of relieving against any remaining wrongs was imposed upon the court of chancery.'"

In *International News Service* v. *Associated Press*, 248

U. S. 215, the court held, in sustaining the equity jurisdiction, as follows (page 236):

> "In order to sustain the jurisdiction of equity over the controversy, we need not affirm any general and absolute property in the news as such. The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right. (*Re Sawyer*, 124 U. S. 200, 210, 31 L. ed. 402, 405, 8 Sup. Ct. Rep. 482; *Re Debs*, 158 U. S. 564, 593, 39 L. ed. 1092, 1105, 15 Sup. Ct. Rep. 900); and the *right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already* acquired. (*Truax* v. *Raich*, 239 U. S. 33, 37, 38, 60 L. ed. 131, 134, L. R. A. 1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283; *Brennan* v. *United Hatters*, 73 N. J. L. 729, 742, 9 L. R. A. (N. S.) 254, 118 Am. St. Rep. 727, 65 Atl. 165, 9 Ann. Cas. 698; *Barr* v. *Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881). It is this right that furnishes the basis of the jurisdiction in the ordinary case of unfair competition."

We call attention to the last citation, because it shows that the rights confirmed in the employes under the Railway Labor Act include liberty of contract and the right to acquire property by honest labor, which latter right, in the language of the Supreme Court, "is as much entitled to protection as the right to guard property already acquired."

It is unnecessary to make extensive citations of state authorities in addition to the federal cases above cited. But we may conclude on this point with a reference to the many cases cited in 1 Corpus Juris 986-988, to this effect:

> "It is not necessary that such jurisdiction should be specifically conferred by the statute. * * * But it is sufficient if the statute creates the equitable right and that it comes within the ordinary and appropriate jurisdiction of the equity court, and that the exercise of such jurisdiction is not prohibited by the act."
>
> *Montandon* v. *Deas*, 14 Ala. 33.

A comment upon the Pennsylvania Railroad cases.

Counsel for petitioners seek to have this court construe the present Railway Labor Act according to the construction placed by the Supreme Court upon Title III. of the Transportation Act, 1920, which was repealed by the present Act. This is an extraordinary example of "logic." Congress found that the Transportation Act did not provide a satisfactory means for preserving industrial peace on the railroads. Therefore, Congress passed the present Railway Labor Act, for the express purpose of *changing* the law laid down in the Transportation Act. Now counsel for plaintiff argue that the very provision of the present law passed to remedy the evils which persisted under the Transportation Act should be interpreted to mean no more than the provisions of the Act which was repealed. They bolster up this argument by a most extraordinary misinterpretation (and by a false, misleading "parallel") of the provisions of both acts. (Petitioner's Brief, pp. 64, 65.)

To "parallel" statutory obligations with unenforceable "principles" announced by an *advisory* board—is (to comment mildly) a somewhat deceptive method of argument. We will endeavor to summarize the provisions and declared purposes of the two Acts, so as to show that the Railway Labor Act was passed for the precise purpose of making enforceable the rights of the employes, which were held not enforceable under the Transportation Act.

Title III. of the Transportation Act did not make it the duty of carriers and employes to make and maintain agreements, but merely made it their duty to exert every reasonable effort to avoid any interruption to the operation of a carrier growing out of a labor dispute. (Section 301.) Title III. established the Railroad Labor Board, which had power to hear and decide any dispute submitted

to it. But the board had no authority to enforce its decisions and Title III. expressly provided that if a decision of the board were violated, the board could determine that fact and "make public its decision." It was clear, beyond question, that the force of public opinion alone was relied upon to induce the peaceful settlement of labor disputes.

There was no machinery for making contracts provided, in conference, or with the aid of any government mediators; nor was there any provision for an arbitration which would result in an enforceable award. Title III. did provide that "all such disputes shall be considered and if possible, decided in conference between representatives designated and authorized so to confer." But there was no provision requiring such conferences to be held upon request of either party; no provision requiring the selection of representatives without interference, influence or coercion by the other party. There was no provision prohibiting changes in agreements without notice.

In other words, Title III. was completely devoid of any compulsory features, which would compel the parties to deal with each other. Yet this question of representation became so vital that the labor board, in order to function with any effectiveness at all, found it necessary to lay down certain rules for the conduct of the parties, although, as the Supreme Court subsequently held, these rules had no more binding force than any other rules or orders of the board. The Labor Board did not even *order* the alleged "rules" enforced. What the Labor Board actually *did* was to *advise* the parties that the working *rules* which they were going to *write* into *their agreements* "should be consistent with the *principles*" laid down by the Board. (Decision 119, April 14, 1921.) (See, 267 U. S. 203, 206.)

The sole authority of the board came from the statute. The statute did not authorize it to *enforce* orders. If the

statute itself had imposed a duty upon the parties, an entirely different question would have arisen. The board's sole authority came from Congress and Congress had given it no authority to impose enforceable obligations. But, to reason from this necessary holding of the Supreme Court that, therefore, if Congress itself *had* imposed a duty, that duty would not have been enforceable, is simply to abandon all pretense of logical reasoning.

Counsel for petitioners argue that "a rule promulgated by a statutory board has the same force as if the rule were written in the statute." (Petitioners' Brief, p. 66.) But this legal principle only applies when the "statutory board" has been authorized to make *enforceable* rules. And counsel for petitioners themselves make the point that this court has held that the Railroad Labor Board was *not* authorized to make enforceable rules. Then how can counsel justify comparing the "principles" laid down by a statutory board, having *no authority* to make enforceable rules, with the obligations written in a statute of the United States by the Congress, which certainly possesses ample authority to lay down *enforceable* rules!

A few quotations from the two cases relied upon by counsel for petitioners will make it clear that Congress has *now* done in the Railway Labor Act precisely what the Supreme Court held it had *not* done in the Transportation Act—that is, Congress has laid down enforceable duties.

In the first *Pennsylvania Railroad* case the court held as follows:

> "But Title III was not enacted to provide a tribunal to determine what were the legal rights and obligations of railway employers and employees or to enforce or protect them. *Courts can do that.* The Labor Board was created to decide how the parties *ought* to exercise

their legal rights so as to enable them to co-operate in running the railroad." (Italics ours.)

Pennsylvania Railroad Company v. *Labor Board*, 261 U. S. 72.

Then in the second *Pennsylvania* case the court held:

"What the complainants here are seeking to do is to enforce by mandatory injunction a compliance with a *decision* of the Board not based on the *legal rights* of the parties, but on its judgment as to what legal rights the disputants should surrender or abate in the public interest and in the interest of each other, to maintain harmonious relations between them necessary to the continuance of interstate commerce, and to avoid severing those relations as they would have the strict legal right to do. Such a remedy by injunction in a court, it was not the intention of Congress to provide." (Italics ours.)

Pennsylvania System No. 90 v. *Pennsylvania Railroad Company*, 267 U. S. 203.

It will be noted, in reviewing the foregoing two cases upon which counsel for petitioners rely, that the Supreme Court impliedly affirmed the "lawful right" of the employes to select their own representatives, in pointing out that the statute did not deprive either side of the rights claimed. But the court held, in both *Pennsylvania Railroad* cases, that the labor board had not been empowered to enforce its decisions and this holding was decisive of both cases. In the second case, the court also held, somewhat incidentally, but not as a mere matter of dictum, that the "so-called mandatory language of Section 301" would not be given the force of a statutory obligation. But the court did not make this holding solely on the ground that the Section was not "accompanied by a penalty for its violation or some other means of compulsion," but *on the specific ground that the other provisions* of the statute, which aided in the construction of Section 301, showed clearly no

intention in the mind of Congress that the disputants "were in any way to be forced into compliance with the statute or with the judgments pronounced by the Labor Board, except through the effect of adverse public opinion."

Now, in order to correct this admitted impotence of the Labor Board and the inadequacy of the statutory mandate, when the Transportation Act of 1920 was repealed, there was written into the Railway Labor Act of 1926 a *statutory right* to free representation and a *statutory obligation* upon the other party not to interfere with the free selection of representatives.

> "Every statute must be construed with reference to the object intended to be accomplished by it. In order to ascertain this object it is proper to consider the occasion and necessity of its enactment, the defects or evils in the former law, and the remedy provided by the new one; and the statute should be given that construction which is best calculated to advance its object, by suppressing the mischief and securing the benefits intended." (36 Cyc. 1110, 1111.)

If extraneous sources of construction are utilized it is demonstrated that Congress intended to create legally enforceable rights and duties.

Counsel for petitioners are responsible for bringing into this discussion the use of extraneous sources of construction of the Railway Labor Act. The mandatory language of the Act in its ordinary significance would be construed as creating legal duties and rights. These, as heretofore shown, can be enforced in a court of equity. Although relief was denied to the employes of the Pennsylvania Railroad in 267 U. S. 203, the court pointed out in that case that the railroad, in seeking "to control its employes by agreements free from the influence of an independent trade union," was "defeating the purpose of Congress." The

purpose of Congress was developed in the Transportation Act of 1920. That purpose was then made *enforceable* in the Railway Labor Act of 1926. The duty to be enforced was formerly *declared* in a specifically *unenforceable decision* of the Railroad Labor Board. Now this duty is *imposed* in an Act of Congress, which has been violated. Statutes are enacted to make law to impose legal obligations, not merely to exhort people to be good! The natural construction of a law is to give it *legal force.*

In their effort to have the Railway Labor Act construed as a sterile and not a virile act, counsel for petitioners have resorted to sources of interpretation which have received no sanction whatsoever in the courts.

This court has held that—

> "Where doubts exist and construction is permissible, reports of the committees of Congress and statements made by those in charge of the measure and other *like extraneous matter* may be taken into consideration to aid in the ascertainment of the true legislative intent."
>
> *United States* v. *Missouri P. R. Co.*, 278 U. S. 269, 278.

In the same case it was held:

> "But the reasons for and the significant circumstances leading up to the enactment may be noticed *in confirmation of the meaning conveyed by the words used.*"
>
> *United States* v. *Missouri P. R. Co., supra.*

In the present brief for respondents we have furnished the court with a legislative history of the Railway Labor Act which confirms the natural "meaning conveyed by the words used." In other words, we have shown that Congress intended to impose a legal duty when it used the words "duty" and "shall."

But counsel for petitioners have first asserted ambiguity in the unambiguous and then have attempted to support

this construction by quoting from transcripts of discussions in *Committee Hearings* and have described these incorrectly as "Committee Reports." (Petitioners' Brief, pp. 73-76.) Petitioners have not made a single quotation here from the actual report of a committee of either house. The reason is clear. The Committee Reports do not support, but in fact disprove, their construction of the Act. For example, a report of the Committee on Interstate and Foreign Commerce of the House reads in part as follows:

> "During the hearings conducted by the committee it was conceded by all concerned that the enactment of this agreement into law would impose upon the parties to the agreement the moral obligation to settle their differences in the manner provided by law, so as to insure to the public continuity and efficiency of interstate transportation service, and to protect the public from the injuries and losses consequent upon any impairment or interruption of interstate commerce through failures of managers and employees to settle peaceably their controversies. **There are also legal obligations which would be accepted by and imposed upon the parties by the proposed law** that afford further guaranties of improved and continuous transportation service and protection of the public interest therein."

We have heretofore made quotations from the report of the Committee on Interstate Commerce of the Senate, wherein the legislative intention to write legally enforceable obligations into the Act is conclusively shown. (See page 65 of this brief.)

We submit that the few (partially inaccurate) quotations of the statements of senators and witnesses in a committee hearing (found in petitioners' brief)—or even the more extensive, garbled and confusing quotations printed in the record (pp. 918-962) shed little light on the intention of Congress.

It must be clear to the court that in committee discussions members of Congress are seeking to find out what a

proposed bill means and that their arguments over its provisions and their first impressions and interpretations of them do not illuminate the ultimate legislative intent. So also the testimony of witnesses can not be ordinarily regarded as a reliable source of construction of the terms of a bill. In the present case some authority may attach to the testimony of proponents of the legislation for a somewhat unique reason. Under encouragement of the President, representatives of carriers and their employes had drafted an agreed bill, providing machinery whereby they believed industrial relations on the railroads could be tranquilized. The complete explanations of the representatives of the two parties who had thus agreed, interpreting the legislation they presented for enactment, might have considerable weight, because the bills presented were enacted into law with slight modification. Thus it appeared that Congress desired to carry out the described intentions of the proponents, or at least of the draftsmen, of the bill.

The railroads were represented by Alfred P. Thom and the labor organizations by Donald R. Richberg in the final drafting of the bill and in the hearings in both Houses of Congress. But in order to have the explanations made particularly by these spokesmen for the respective parties intelligently understood, the underlying theory of the legislation, which they explained, must be understood. The bill was *not presented* for the purpose of providing a means of *fixing by compulsion the terms and conditions of labor, nor* to provide for *compulsory arbitration thereof*. Hence emphasis was laid throughout the hearings upon the fact that *such* compulsion had not been provided. Against the persistent exponents of compulsory arbitration, the carriers and their employes stoutly maintained that compulsory methods would not avail; that they would, in fact, be unconstitutional.

The proposed legislation was grounded on the theory that voluntary agreements would provide the only safe and sure basis for continuous and harmonious employment relations. But it was recognized that, in order to induce the making of contracts, duties should be imposed upon the parties to conduct themselves in a manner which would provide, not only the possibility, but also the probability that agreements would be made and maintained. It was pointed out that in order that such agreements should be effective, they must be made by duly authorized representatives. Thus the thought of compulsion *in a course of conduct* of the parties toward each other was frequently brought forth and on the basis of *such compulsory obligations*, it was freely admitted that the use of judicial authority would be appropriate in various cases.

For example, petitioners' brief (page 74) quotes statements of Mr. Thom and Senator Bruce and Senator Pittman (without identifying the spokesmen). But later in the same hearing Senator Pittman called Mr. Thom's attention to the exact section under consideration in the present case and said: "I want your interpretation of it because it will depend very largely on that whether I vote for this bill." Thereupon he read the third paragraph of Section 2 and Mr. Thom said: "That gives perfect freedom to any class of employees to choose their representatives." (Rec., 921.)

The colloquy proceeded and again Mr. Thom said: "Here there is perfect freedom of either side to choose its own representatives without interference by the others." Then Senator Bruce said: "Well Mr. Thom the idea is too to get rid of what sometimes has happened. That is to say the selection of representatives of labor by the carriers themselves. That is to say, representatives that were not really genuine representatives of labor. There has been

some complaint I know on that score." Mr. Thom answered: "Yes."

The transcript of the Senate Hearings covered 222 printed pages. The transcript of the House Hearings covered 397 printed pages. In the House Hearings there was a much more detailed analysis of the bill and while Mr. Thom took the lead in explaining the provisions of the bill in the Senate Hearings, Mr. Richberg performed the same service in the House Hearings. Under questions from Representative Fredericks he explained that the draftsmen of the bill had not set up any penalty sections, but had created legal duties which would be enforceable in the courts, stating specifically in regard to the third paragraph of Section 2 that "any effort on the part of either the employer or employe to control the operations of the organizations of the other to influence or control the selection of representatives, would amount to * * * a conspiracy to violate this law, and the courts have found remedies for enjoining concerted action and even individual action to violate the law." (Rec., 940-942.) Thereafter under questions from several members of the commitee in regard to the enforceability of the duties imposed by the law, Mr. Richberg, speaking for both carriers and employees who had joined in drafting the Act, repeatedly stated the intention of the draftsmen to provide enforceable legal obligations. (Rec., p. 942-956.)

These statements before Committees might not provide very reliable evidence of the ultimate legislative intention, were it not for the fact that the construction of the law thus presented was adopted by the members of Congress "in charge of the measure." As a result, the law was voted upon and passed with the general understanding that it provided legal and enforceable obligations. Therefore, it is appropriate to present for the consideration of the court the statements made on the floor of the House by Mr.

Newton of Minnesota, a member of the Committee on Interstate and Foreign Commerce and one of those in charge of this measure during its passage through the House. Mr. Newton said:

> "The whole theory of this bill, at least up to the emergency board, is cooperative, not compulsory. That is, there is no compulsion to do or not to do specific acts; but there are imposed upon the parties, in the interests of the public and the maintenance of uninterrupted service, certain duties. *The violation by either party of these duties would call for appropriate action in the courts of law and equity by the aggrieved party or the public.*"

Mr. Garrett asked whether "the matter to which we have just been referring can be enforced now by mandatory injunction."

Mr. Newton replied:

> "I mean that there are obligations imposed by this bill upon both carrier and employee; that these obligations can be enforced in the law and equity courts just the same as other obligations and duties are enforceable in those courts."

The foregoing statements appear in the record of this case, pages 957-958.

In conclusion on this point we may suggest that if it is necessary or proper in the present case to resort to extraneous matter for the construction of the Railway Labor Act, there is ample material available in the reports of the Committees previously quoted, in the statements made by those in charge of the measure, and even in the hearings before the Committees of Congress; and that some of this material was put in evidence and appears in the record of the present case at the pages above indicated. There can be only one conclusion from any careful review of this last chapter of the legislative history of the Act; and that is that both Houses of Congress understood perfectly well

that in the Railway Labor Act rights and duties were being written into law, creating legal obligations which would be enforceable through appropriate proceedings in the courts. It was intended that such obligations should be legally enforceable and the language of the Act was made clear and unequivocal. Then, in the two instances where it appeared that legal obligations might *unintentionally* be created, provisos were written into the Act expressly negativing the legal enforceability of the obligation that might be claimed to exist. (Section 7, paragraph first; Section 9, paragraph eight.)

POINT I-C.

Congress has the power under the Interstate Commerce clause of the Constitution and within the limitations of the Constitution to impose the statutory obligations upon carriers and their employees which were violated by the petitioners in the present case.

The argument under petitioners' Fourth Point is based on a false premise. A number of acts are discussed which were required of the petitioners in the contempt decree to *purge themselves of the contempt.* Their counsel then argue that, since petitioners were required to do these things to purge themselves of contempt, the law as applied in the temporary injunction must be construed as *specifically* prohibiting the doing of any of these acts. Petitioners thus seek to read into the injunction parts of the contempt order. Petitioners thereby entirely misapply the law of contempt and ignore the extensive scope of a remedial order which may be entered in contempt proceedings to restore the *status quo ante.* We discuss this question at length under Points IV and V of this brief and cite ample authorities sustaining our position.

At this point, however, it is well to note that, in an endeavor to bring this case within the holdings in the Adair and Coppage cases, later discussed, petitioners have made much in their brief of the restoration to service of Stotzer, Hudson and Ginsburg by the contempt order, devoting many pages of their brief to setting forth the facts alone, as to the discharge of these men. This is making a mountain out of a mole-hill. The discharge and restoration to service of these men is a mere incidental issue in this case. In setting forth in its opinion the violations of the temporary injunction on which it based its contempt order, the District Court did not even refer to the discharge of these men. (24 Fed. (2nd) 426.) Stotzer's discharge, for instance, may have been for cause and entirely legal when considered by itself, but *when taken as a part of a conspiracy*, or illegal plan to interfere with the right of the employees as a whole to self-representation (by destroying their morale) it becomes illegal and a violation of the injunction. Lawful acts are constantly forbidden in injunctions when they are the means of accomplishing an unlawful object. However, even if the District Court had no power or authority to restore these men to service, this is of no great consequence to the issues in this case and such a ruling would only warrant striking out from the remedial order that part thereof relating to the reinstatements, leaving the balance of the contempt order and the final injunction undisturbed.

If the Act of Congress imposed legal obligations which were violated, and Congress had the constitutional power to impose such obligations, the injunction was clearly proper; and the contempt order "did not go beyond requiring the undoing of what had been done in violation of the injunction," as found by the Circuit Court of Appeals.

The District Court and Circuit Court of Appeals in able and exhaustive opinions have held paragraph three of Sec-

tion 2 of the Railway Labor Act of 1926, on which this suit is based, to be constitutional (24 Fed. (2nd) 426, 33 Fed. (2nd) 13, 16.) Knowing that these opinions will receive the careful consideration of this court, we will not burden the court with an extended constitutional argument, but confine ourselves to a brief reply to petitioners' principal contentions. These contentions are based primarily upon the decisions of the Supreme Court in the cases of *Adair* v. *United States*, 208 U. S. 161 and *Coppage* v. *Kansas*, 236 U. S. 1. According to the majority opinion in the Coppage case, the decision in the Adair case was held to be controlling, because the court "had to deal with a question not distinguishable in principle" from the one presented in the Coppage case. Therefore, the cases may be considered together. Mr. Justice McKenna and Mr. Justice Holmes wrote vigorous dissents in the Adair case and Mr. Justice Holmes and Mr. Justice Day wrote similar dissents in the Coppage case (Mr. Justice Hughes joining in the dissent of Mr. Justice Day). It may thus be properly observed that the constitutionality of the tenth section of the Erdman Act (involved in the Adair case) was recognized as a close question, even in 1907, when that case was decided. Also it will be observed, in reviewing the legislative history of the present Act, that there have been great changes in public opinion, in the prevailing methods of dealing with industrial relations, and in legislation effecting the regulation of interstate commerce since that case was decided.

For example, the majority opinion in the Adair case asked this question: "But what possible legal or logical connection is there between an employee's membership in a labor organization and the carrying on of interstate commerce?" The enactment of Title III of the Transportation Act of 1920 created an imperative legal recognition of a

very definite legal connection between membership in a labor organization and the carrying on of interstate commerce. Congress enacted a law setting up a governmental tribunal to settle labor disputes, so as to avoid interruptions of interstate commerce. This machinery expressly included the use of some form of labor organization. Employees had to be represented in some form of organization in order to permit the Railroad Labor Board to function.

Now for over ten years railway employees have been almost universally organized, either in organizations of their own creation, or in organizations fostered and promoted by railroads, whose managers recognize that they cannot deal effectively with employees as individuals, but must deal with them collectively through organizations in order to promote efficiency in operation.

Some years after the opinion in the Adair case was written the Supreme Court of the United States gave recognition to the changing conditions of industrial relations in the opinion of the late Chief Justice Taft, in which he wrote in regard to labor unions:

> "They were organized out of necessities of the situation. A single employee was helpless in dealing with an employer. * * * Union was essential to give laborers opportunity to deal on equality with their employer. * * * To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood."
>
> *American Steel Foundries* v. *Tri City Trades Council*, 257 U. S. 184, 209.

Thus when confronted in this case with the argument that the decisions in the Adair and Coppage cases decide that Congress cannot legislate to promote collective bargain-

ing between railroad employers and employees, we might, at the outset, take the position suggested in the opinion of the District Court in the instant case that changing conditions alone would warrant a re-consideration by this court of the doctrines of the Adair and Coppage cases. But it is not necessary that we ask such a re-consideration, in order that the constitutionality of the provisions of the Railway Labor Act may be sustained.

The Railway Labor Act proceeds upon an entirely different theory of law and imposes entirely different obligations upon railroad employers and employes from those involved in the Adair and Coppage cases. The decisions of the Supreme Court in those cases are not controlling in the present case, which will be at once evident when the laws involved and the decisions thereon are compared with the law here involved and the decision of the lower courts thereon.

In the Adair case, a railroad official was indicted and convicted of a misdemeanor in the discharge of a railroad employee because of the employee's membership in a labor organization. The conviction was set aside and the decision of the Supreme Court, by clear language, was restricted to the express holding that Congress could not make it a *crime against the United States* for a railroad agent to discharge an employee simply because of his membership in a labor organization. The court held: "No such rule of criminal liability as that to which we have referred can be regarded as in any just sense a regulation of interstate commerce."

In the Coppage case there was likewise a conviction of a railroad officer for violation of a state statute, forbidding employers to exact a promise from employees not to join or retain membership in a labor organization. The Su-

preme Court referred to the opinion in the Adair case as "carefully restricting the decision to the precise matter involved." The court held that the same principle controlling the Adair case and making invalid a federal statute would invalidate a state statute; and the court again and most precisely held that the Kansas Act "as construed and applied so as to punish with fine and imprisonment an employer or his agent for merely prescribing as a condition upon which one may secure employment under or remain in the service of such employer that the employee shall enter into an agreement not to become or remain a member of any labor organization while so employed, is repugnant to the due process clause of the Fourteenth Amendment and, therefore, void."

The court based both these decisions on the announced principle that an employer has a right to determine whom he will employ and whom he will discharge and that it cannot be made a criminal offense for him to exercise this right to discriminate against a member of a labor organization.

The Railway Labor Act in the first place does not make it a crime for an employer to hire whom he pleases, or discharge whom he pleases. The Act does not attempt to limit his power of hiring or discharge. The Act provides only that those who *are* his employees shall have the right to designate their own representatives to negotiate with him concerning terms and conditions of employment and be free from any effort on the part of the employer to perpetrate a fraud upon the employees through making contracts, fixing the terms and conditions of employment, which purport to bind employees who have not given their supposed representatives authority to speak for them, or whose supposed representatives have been influenced in fact to betray their principals. The Act seeks to establish only

the ordinary principles of business morality and to uphold, in the making of labor contracts, the principles of agency which are universally enforced in the courts. (See page 51 of this brief.)

In a word, it may be said that the Act declares as a public policy, in order to prevent interruptions of interstate commerce, that labor relations shall be fixed by contract and that such contracts shall be validly made according to established legal principles.

It must be apparent that there is not in issue in the present case the basis of the decision in the Adair case, that is, the right of the employer to hire whom he pleases. Nor is there in issue in the present case the basis of the Coppage case, that is, the right of the employer to discharge whom he pleases. Nor is there in issue in the present case the criminal liability of the employer for exercising these rights, which was involved in both the Adair and Coppage cases. Therefore, these cases cannot be regarded as in any way decisive of the constitutionality of the requirements of the Railway Labor Act now under consideration.

But more important than all the previous considerations, is the underlying reason for the opinions of this court in both the Adair and Coppage cases, which has now disappeared and cannot be applied in the construction of the present Act. This underlying reason was, *not* that Congress or a state legislature could not impose restraints on an absolute "liberty of contract" as a part of a reasonable regulation of interstate commerce, or that a state could not impose such restraints as a reasonable exercise of the police power, because literally hundreds of such restraints have been imposed and sustained by this court in decisions hereinafter cited. The underlying reason was that "*under the guise of regulating interstate commerce*" there could not be imposed such restraints as found in the Adair case (208 U. S. 180), and that labor organizations were not "charged

by law with public or governmental duties such as would render the maintenance of their membership a matter of direct concern to the general welfare" and hence make this "a legitimate object for the exercise of the police power," as was found in the Coppage case. (236 U. S. 16.)

The following quotations from the two cases reveal clearly this underlying reason:

> "Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the states, must have some real or substantial relation to or connection with the commerce regulated. But what possible legal or logical connection is there between an employee's membership in a labor organization and the carrying on of interstate commerce? Such relation to a labor organization cannot have, in itself and in the eye of the law, any bearing upon the commerce with which the employee is connected by his labor and services. Labor associations, we assume, are organized for the general purpose of improving or bettering the conditions and conserving the interests of its members as wage-earners,—an object entirely legitimate and to be commended rather than condemned. But surely those associations, as labor organizations, have nothing to do with interstate commerce, as such."
>
> *Adair* v. *United States*, 208 U. S. 161, 178.

> "The act, as the construction given to it by the state court shows, is intended to deprive employers of a part of their liberty of contract, to the corresponding advantage of the employed and the upbuilding of the labor organizations. But no attempt is made, or could reasonably be made, to sustain the purpose to strengthen the voluntary organizations, any more than other voluntary associations of persons, as a legitimate object for the exercise of the police power. They are not public institutions, charged by law with public or governmental duties, such as would render the maintenance of their membership a matter of direct con-

cern to the general welfare. If they were, a different question would be presented."

Coppage v. *United States*, 236 U. S. 1, 16.

It is apparent that in both these cases the court had in view, *not* a legislative intention to encourage the free organization of employees (in order to settle labor controversies through enforceable contracts), but the court had in mind a legislative intention to protect or to strengthen *particular* labor organizations.

In answer to this evident thought in the minds of the majority in the Adair case, Mr. Justice Holmes expressed, in his dissent, the opinion that, although "the question what or how much good labor unions do is one on which intelligent people may differ," he would not "pronounce it unwarranted if Congress should decide that to foster a strong union was for the best interest, not only of the men, but of the railroads and the country at large." Similarly in his dissent in the Coppage case, Mr. Justice Day pointed out that "the right to join labor unions is undisputed," and that this right "as against coercive action to the contrary may be the legitimate subject of protection in the exercise of the police authority of the states." The majority evidently agreed with this last proposition. (236 U. S. 14.)

In the construction of the Railway Labor Act there must be recognized a carefully expressed public policy to adopt as the means of preventing interruptions of interstate commerce, and, therefore, as the means of a most necessary regulation of interestate commerce, the encouragement of collective bargaining between carriers and their employees "to make and maintain agreements concerning rates of pay, rules and working conditions." Such "agreements" are, of course, impossible unless the employees are organized and the railroad managements negotiate and sign contracts with such organizations.

The Railway Labor Act does not seek to foster or strengthen *any particular type of organization*, but merely to encourage and to protect any method of organization which the employees themselves adopt and through which they may be truly represented. Thus the questioning of the majority opinion in the Adair case—as to the "legal or logical connection * * * between an employee's membership in a labor organization and the carrying on of interstate commerce"—is completely answered. The connection is now both legal and logical. So also is the doubt expressed by the majority opinion in the Coppage case, as to the reason why the right of employees to associate themselves together (which is, of course, an inherent right under our form of government), should be protected as a "legitimate object for the exercise of the police power." Railway employes are "charged by law" with public duties, and by Act of Congress their *organizations* have been charged with the performance of most important public duties. The Supreme Court itself has answered the questions asked in the Adair and Coppage cases, in the case entitled *Wilson* v. *New*, 243 U. S. 332, from which the following quotations are made:

> "That the power to regulate also extends to many phases of the business of carriage, and embraces the right to control the contract power of the carrier insofar as the public interest requires such limitation, has also been manifested by repeated Acts of legislation as to bills of lading, tariffs, and many other things too numerous to mention. Equally certain is it that the power has been exercised so as to deal not only with the carrier, but with its servants, and to regulate the relation of such servants not only with their employers, but between themselves. Illustrations of the latter are afforded by the Hours of Service Act, the Safety Appliance Act, and the Employers' Liability Act.
>
> "Clear also is it that an obligation rests upon a carrier to carry on its business, and that conditions of

cost or other obstacles afford no excuse and exempt from no responsibility which arises from a failure to do so, and also that government possesses the full regulatory power to compel performance of such duty.

"In the presence of this vast body of acknowledged powers there would seem to be no ground for disputing the power * * * to exert the legislative will for the purpose of settling the disputes, and bind both parties to the duty of acceptance and compliance, to the end that no individual dispute or difference might bring ruin to the vast interests concerned in the movement of interstate commerce, for the express purpose of protecting and preserving which the plenary legislative authority granted to Congress was reposed. * * * Further yet, what benefits would follow to society by recognizing the right, because of the public interest, to regulate the relation of employer and employee and of the employees among themselves, and to give to the latter peculiar and special rights safeguarding their persons, protecting them in case of accident, and giving efficient remedies for that purpose, if there was no power to remedy a situation created by a dispute between employers and employees as to rate of wages, which, if not remedied, would leave the public helpless * * *.

"We are of opinion that the reasons stated conclusively establish that, from the point of view of inherent power, the Act which is before us, was clearly within the legislative power of Congress to adopt * * * a power none the less efficaciously exerted because excised by direct legislative Act instead of by the enactment of other and appropriate means providing for the bringing about of such result."

It is true that "the ruling in *Wilson* v. *New* went to the border line," as held in *Wolff* v. *Court of Industrial Relations*, 262 U. S. 522, 545. The fixing of wages directly was required "to meet a sudden and great emergency," as held in *Adkins* v. *Children's Hospital*, 261 U. S. 525. We expressly disclaim any contention that the case of *Wilson* v. *New* is authority for the proposition that, except as an emergency power, Congress could fix wages of railway employees

directly, or establish tribunals for the determination of such wages through compulsory arbitration. We make this disclaimer because we desire to point out that, doubting the wisdom and the legality of compulsory arbitration, Congress deliberately adopted the policy in the Railway Labor Act of providing a machinery which would lead almost inevitably to the settlement of all labor disputes between carriers and employes through *voluntary* agreements, entered into either directly or through the voluntary submission of controversies to boards of arbitration.

The compulsions which *are* exerted by Congress in the Railway Labor Act are those to which no reasonable man should find objection. Employers and employees are expected, under legally enforceable duties, to endeavor to negotiate their differences to a settlement through *bona fide* representatives of both parties. If negotiations fail, the aid of government mediators is made available. If mediation fails, the opportunity is provided for an arbitration under government auspices, which should secure fair and impartial arbitrators and conditions of arbitration. The enforceable award resulting will be only the *voluntary* agreement of the parties finally made through arbitrators as their joint agents. Thus employers and employees are asked to submit only to the enforcement of terms and conditions of employment upon which they have *voluntarily* agreed. The only compulsions imposed on them are the duties of fair dealing with each other according to universally accepted standards.

We do contend most earnestly and confidently that the power of Congress to regulate interstate commerce, as defined in *Wilson* v. *New*, and the necessity of including in the exercise of that power regulations of the relations of employer and employees engaged in furnishing interstate transportation, amply and unquestionably support the con-

stitutional validity of the Railway Labor Act and the construction thereof by the lower courts in the present case. The underlying doctrine of *Wilson* v. *New* was not novel. The power to regulate employment relations of interstate carriers had been previously and frequently sustained. *Wilson* v. *New* has been cited frequently with an approval which leaves no doubt as to its authority.

The following quotation from *Newberry* v. *United States*, 256 U. S. 388, furnishes a good example of prior and subsequent support of the primary principle declared and enforced in *Wilson* v. *New*:

> "The question of the authority of Congress to determine that laws regulating primary elections are 'necessary and proper for carrying into execution' the other powers specified admits of but one answer—the same given by Chief Justice Marshall in the memorable case last cited (4 Wheat. 421): 'We think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.'
>
> "This principle has been consistently adhered to and liberally applied from that day until this. Among a multitude of illustrative cases that might be cited, some recent notable, but not exceptional, ones may be instanced: Second Employers' Liability cases (*Mondou* v. *New York, N. H. & H. R. Co.*), 223 U. S. 1, 49, (holding that the power of Congress to regulate commerce among the States brings within its authority the relations between common carriers by rail and their employees engaged in such commerce); * * * *Wilson* v. *New*, 243 U. S. 332, 353, 61 L. Ed. 755, 776, L. R. A., 1917E, 938, 37 Sup. Ct. Rep. 298 Ann. Cas. 1918A,

1024, (*holding that the power over interstate commerce extends to regulating the wages of the employees of common carriers engaged therein.*)"

We do not believe that any serious doubt can be cast upon the power of Congress to impose upon railroads and their employes, as a necessary regulation of interstate commerce, the duties written in the Railway Labor Act as legally enforceable obligations. Therefore, we will only refer briefly to a few recent decisions of this court in concluding our argument on this point. It seems unnecessary to multiply citations on the settled doctrine that there is no absolute liberty of contract but that liberty of contract means freedom from arbitrary restraint, not immunity from reasonable regulation. The following citations should be sufficient.

"There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. *Crowley* v. *Christensen*, 137 U. S. 89; *Jacobson* v. *Mass.*, 197 U. S. 1.

* * * * *

"The right to make contracts is subject to the exercise of the powers granted to Congress for the suitable conduct of matters of national concern; as, for example, the regulation of commerce with foreign nations and among the several states." (Citing numerous cases.)

C. B. & Q. R. Co. v. *McGuire*, 219 U. S. 549.

"That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has often been decided by this court."

Union Dry Goods Co. v. *Ga. P. S. Co.*, 248 U. S. 372.

"Contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority."

Legal Tender Cases, 12 Wall, 457.

"The liberty of contract guaranteed by the Constitution is freedom from arbitrary restraint—not immunity from reasonable regulation to safeguard the public interest."

Liberty Warehouse v. *Burley, etc., Co.*, 276 U. S. 71.

"It is also well established by the decisions of this court, that such liberty is not absolute or universal, and that Congress may regulate the making and performance of such contracts whenever reasonably necessary to effect any of the great purposes for which the national government was created." (Citing numerous cases.)

Highland v. *Russell, etc. Co.*, 279 U. S. 253, 261.

One additional citation to a recent case is desirable in support of the propriety of extending the power of regulation of interstate commerce over employment relations.

In *Anderson* v. *Shipowners Association*, 272 U. S. 359, there was considered in this court a bill in equity filed as a class suit by employes to restrain employers from an illegal exercise of employing power, violating in that case the Anti-Trust Acts. The suit, therefore, had striking points of similarity to the present suit. The defense of the employers was based on the claimed right of a combination of employers to regulate the employment of men, and a denial that such acts were in restraint of commerce. The unanimous opinion of this court, delivered by Mr. Justice Sutherland, merits somewhat extensive quotation. The facts of the case may be summarized as follows:

The bill alleged that petitioner was a member of the Seamen's union and he sued in behalf of himself, as well as

in behalf of the 10,000 members of that union. He alleged that the respondent Shipowners Association controlled substantially all vessels of American registry engaged in interstate and foreign commerce among the ports of the Pacific Coast and with foreign countries; that they had combined to control the employment of all seamen on the Pacific Coast and through their combination dictated the terms and conditions of employment, the court held:

"From these averments, the conclusion results that each of the shipowners and operators, by entering into this combination, has, in respect of the employment of seamen, surrendered himself completely to the control of the associations. If the restraint thus imposed had related to the carriage of goods interstate and foreign commerce—that is to say, if each shipowner had precluded himself from making any contract of transportation directly with the shipper and had put himself under an obligation to refuse to carry for any person without the previous approval of the associations—the unlawful restraint would be clear. But ships and those who operate them are instrumentalities of commerce and within the commerce clause no less than cargoes. Second Employers' Liability Cases (*Mondou* v. *New York, N. H. & H. R. Co.*, 223 U. S. 1, 47-49, 56 L. Ed. 327, 345, 346, 38 L. R. A. (N. S.) 44, 32, Sup. Ct. Rep. 169, 1 N. C. C. A. 875.) And, as was said by this court in *United States* v. *Colgate & Co.*, 250 U. S. 300, 307, 63 L. Ed. 992, 996, 7 A. L. R. 443, 39 Sup. Ct. Rep. 465: 'The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce; in a word, to preserve the right of freedom to trade.

* * * * *

"It is not important, therefore, to inquire whether, as contended by respondents, the object of the combination was merely to regulate the employment of men and not to restrain commerce. A restraint of interstate commerce cannot be justified by the fact that the object of the participants in the combination was to

benefit themselves in a way which might have been unobjectionable in the absence of such restraint.

* * * * *

"Here, however, the combination and the acts complained of did not spend their intended and direct force upon a local situation. On the contrary, they related to the employment of seamen for service on ships, both of them instrumentalities of, and intended to be used in, interstate and foreign commerce; and the immediate force of the combination, both in purpose and execution, was directed toward affecting such commerce. The interference with commerce, therefore, was direct and primary, and not, as in the cases cited, incidental, indirect and secondary."

It seems to follow inevitably, from the reasoning of the court in the opinion just quoted, that a combination to monopolize employment is held to involve an unlawful restraint upon the free exercise of the right to obtain employment in interstate commerce; that those who operate ships (and railroads) are instrumentalities of commerce; and that the federal power to regulate interstate commerce can be properly extended to restrain the control of such instrumentalities in a manner destructive of legislative protections of interstate commerce. It is appropriate to note that, in the case last cited, the respondent employers urged, *in vain*, the extension of the doctrine of the *Adair* case to permit them to exercise an unrestrained control over employes.

Finally, we would point out that employers and employes are essentially competitors in the field of industrial relations and are entitled, each against the other, to have enforced the principles of fair competition. Each party is under a duty to exercise its rights in such a manner as not unduly to injure the exercise of the rights of the other.

"I have seen the suggestion made that the conflict between employers and employed is not competition. But I venture to assume that none of my brethren

would rely on that suggestion. If the policy on which our law is founded is too narrow in the terms of free competition, we may substitute free struggle for life. Certainly the policy is not limited to struggles between persons of the same class competing for the same end. It applies to all conflicts of temporal interests."

Vegelahn v. *Guntner*, 167 Mass. 92, 107.

"The parties are competitors in this field; and, on fundamental principles applicable here as elsewhere, when the rights or privileges of the one are liable to conflict with those of the other, each party is under a duty so to conduct his own business as not unnecessarily or unfairly to injure that of the other. *Hitchman Coal & Coke Company* v. *Mitchell*, 245 U. S. 249, 254."

International News Service v. *Associated Press*, 248 U. S. 215, at pp. 235-236.

Employers have resorted in a host of cases to the courts of equity for protection against interference by employes with the rights of employers, whereby the courts have restrained the unfair or improper exercise of admitted rights of employes to advance their own interest, because of injury thereby inflicted upon the rights of the employers. This court, and the inferior federal courts and the state courts, have been constantly called upon to strike a fair balance between the conflicting rights and interests of the parties. In the present case, the employes are merely seeking the enforcement of a proper balance between their rights to promote their own interests and the rights of an employer to promote his interests. They believe that the balance should be weighted in favor of the protection of their rights which are here involved, not only because those rights have been specifically declared in an Act of Congress, and not only because their protection has been found by Congress to be essential to the regulation of interstate commerce, but also because unless the minor restraint here

sought upon the employer's liberty of contract is imposed, the result will be a substantial *destruction* of the employes' liberty of contract, which cannot be exercised except through representatives duly designated and authorized to act in their behalf and free from the interference, influence or coercion of the other party.

Let us refer, in conclusion, to the careful statement in the opinion of this court in the *Coppage* case limiting the effect of that opinion in which the court said:

> "To avoid possible misunderstanding, we would here emphasize what has been said before that so far as its title or enacting clause expresses a purpose to deal with coercion, compulsion, duress or other undue influence, we have no present concern with it, because nothing of that sort is involved in this case. * * * We do not mean to say, therefore, that a state may not properly exert its police power to prevent coercion on the part of employers toward employes, or *vice versa*."

Coppage v. *Kansas*, 236 U. S. 1, 14, 15.

POINT II.

In reply to Petitioners' Point 5.

Petitioners contend that the Clayton Act prohibits any injunction in this case. We answer that:

SECTION 20 OF THE CLAYTON ACT DOES NOT PROHIBIT THE GRANTING OF AN INJUNCTION IN THIS CASE. COMPLAINANTS HAVE MOST IMPORTANT PROPERTY RIGHTS AND OTHER RIGHTS WHICH THEY ARE ENTITLED TO HAVE PROTECTED BY INJUNCTIVE RELIEF.

A diligent search of the authorities has failed to disclose any previous case where Section 20 of the Clayton Act has been set up as a bar to a suit for injunctive relief by an employe against an employer. Petitioners cite no such case.

On the other hand the bringing of a suit *by employes under* the Clayton Act was upheld in *Anderson* v. *Shipowners Asso.*, 272 U. S. 359, from which we have quoted at length under the preceding point.

In truth Section 20 of the Clayton Act was enacted primarily to protect the rights of *employes*, as shown in *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 471-482, where this court held:

> "We deem this construction altogether unadmissible. Section 20 must be given full effect according to its terms as an expression of the purpose of Congress; but it must be borne in mind that the section imposes an exceptional and extraordinary restriction upon the equity powers of the courts of the United States, and upon the general operation of the Anti-trust Laws—*a restriction in the nature of a special privilege or immunity to a particular class*, with corresponding detriment to the general public; and it would violate rules of statutory construction having general application and far-reaching importance to enlarge that special privilege by resorting to a loose construction of the section, not to speak of ignoring or slighting the qualifying words that are found in it. *Full and fair effect will be given to every word if the exceptional privilege be confined—as the natural meaning of the words confines it—to those who are proximately and substantially concerned as parties to an actual dispute respecting the terms or conditions of their own employment, past, present or prospective.*"

In *King* v. *Weiss & Lesh Mfg. Co.*, 266 Fed. 257, 260, the Circuit Court of Appeals for the Sixth Circuit said:

> "We understand defendants' counsel also to take the position that, since Section 20 of the Clayton Act prohibits an injunction, excepting in case of injury to property or property rights, the issue of the injunction was in conflict with this Act, because the rights of the plaintiff to continue its business, free from unlawful obstruction, was neither 'property' nor a 'property right.' There is no sufficient basis for this contention. The Clayton Act did not undertake to make

new definitions of 'propery' and 'property right.' It used these terms in their then accepted and well-understood definitions. It was dealing with the fact that between the recognized property right of the employer to conduct his business and the other recognized right of the employees to strike, more or less conflict would arise; and *it was prescribing the kind and degree of injury to this employer's right* which should be deemed rightly appurtenant *to the employees' conflicting right*, and which should therefore not be deemed unlawful. No court has held, since the passage of the Clayton Act, so far as we find, that it was intended to forbid an injunction in aid of an employer's right to keep his business running, in any case where the injury to that right, which the defendants were inflicting, is beyond the limits which the Act purports to authorize. That the right to prosecute a lawful business without unlawful obstruction is either property or a property right has always been recognized, and is at the foundation of equity jurisdiction in this entire class of cases. It is sufficient to cite *Hitchman* v. *Mitchell*, 245 U. S. 229, 38 Sup. Ct. 65, 52 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461, as an example of the unquestioned acceptance of this basis of jurisdiction."

Is it the contention of petitioners that employers have a property right to prosecute *their* business, but that employes have no property right to prosecute *their* business. If this is their contention the universal holding of the courts deny its validity.

In *Adair* v. *United States*, 208 U. S. 161, 162, this court said:

> "It was the defendant Adair's right—and that right inhered in his personal liberty, and *was also a right of property*—to serve his employer as best he could."

Would petitioners argue that an employe has a property right to serve his employer, but not a property right to serve himself?

In *Coppage* v. *Kansas*, 236 U. S. 1, 14, also relied on by petitioners, this court said:

> "*Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property.* Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. *The right is as essential to the laborer as to the capitalist,* to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money."

In *Dorchy* v. *Kansas*, 272 U. S. 306, 311, this court held:

> "The right to carry on business—be it called liberty or property—has value. To interfere with this right without just cause is unlawful."

Again we ask whether the "business" carried on by doing work for others is not entitled to the same protection as the "business" of directing the work of others? Does a carpenter have a "property right" in his labor when he works as an independent contractor, but none when he works as a wage-earner? Is not petitioners' argument easily reduced to an absurdity?

In *Gillespie* v. *People*, 58 N. E. 1007, 1009 (Ill.), cited by petitioners, the court held:

> "*Labor is property. The laborer has the same right to sell his labor, and to contract with reference thereto, as any other property owner.* The right of property involves, as one of its essential attributes, the right not only to contract, but also to terminate contracts."

In *State* v. *Goodwill*, 10 S. E. 285, 287 (W. Va.), also cited by petitioners, the court held (quoting a famous declaration):

> "The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of

his own hands, and to hinder him from employing these in what manner he may think proper, without injury to his neighbor, is a plain violation of this most sacred property.

"The vocation of an employer, *as well as that of his employee,* is his property. Depriving the owner of property or one of its attributes is depriving him of his property, under the provisions of the Constitution. The right to use, buy and sell property and contract in respect thereto, including contracts for labor—which is, as we have seen, property—is protected by the Constitution."

In *Louis K. Liggett Co.* v. *Baldridge,* 278 U. S. 105, this court said in part:

"That appellants' business (owning chain of drug stores) is a property right (*Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, 65 L. Ed. 349, 356, 16 A. L. R. 196; *Traux* v. *Corrigan,* 257 U. S. 312, 66 L. Ed. 254, 260, 27 A. L. R. 375), and as such entitled to protection against State legislation in contravention of the Federal Constitution, is, of course, clear."

We refer again to the authorities quoted from under Point I-B of this brief; particularly to the case of *International News Service* v. *Associated Press,* 248 U. S. 215. Also we would point out that the Circuit Court of Appeals in its opinion in the present case discussed this point at length (R. 1144-1145), as did the District Court in its opinion making the temporary injunction permanent. (Rec., 401.)

It seems particularly illogical for petitioners to argue in this case, in one breath, that the statute and injunction violate their property right to determine employment relations, and, in the next breath, that the employes have no property right in the same relations. Apparently they argue that employers have a property right to buy labor, but no one has a property right to sell labor! The choicest example of this logic appears in Petitioners' Brief on page 98, where they say:

"Whether or not 'better wages' and better 'working conditions' will in the future be granted to these plaintiffs, or any of them, rests *entirely within the control of the defendant.*"

Thus petitioners airily disregard all economic law and their own dependence upon social and economic conditions which are utterly beyond their "control." Wages and working conditions are actually determined by forces largely beyond the control of individual employers or labor organizations. These forces, which are not yet subject to *any* organized human control, produce times of prosperity and depression, and constantly vary the supply and demand for products, services and labor. Employers and employes bargain for the most advantageous terms thought to be obtainable by each under existing conditions.

There is only a comparatively narrow margin between what the employer *must give* and what the employe *must accept*—a narrow field of individual "control." There is no absolute control even in this field, because the economic power of the respective bargaining parties increases and diminishes from day to day as one's need for the other's service becomes more or less acute.

The principal "liberty of contract" which each party has, lies in making the final decision as to how far he must yield self-interest to the conflicting interests of others which press against him on every side. There is no freedom from the pressure of these forces which government can grant. Petitioners have posed themselves like King Canute on the shore of a sea of economic forces and demand that they shall be granted freedom from any invasion of their liberty to "control" the ebb and flow of the tide.

In the field of labor agreements, lying between the bench marks of high and low tide, the property rights of petitioners and those of respondents are equally involved in

their competitive relations. The Clayton Act has been held not to forbid an injunction to restrain unfair competition by employes. Upon the same reasoning it can not be held to forbid a like restraint of unfair competition by employers.

POINT III.

In reply to Petitioners' Point 3.

Petitioners claim that equity will not determine mere abstract rights, the enforcement of which leads to no definite result. We reply that:

THE EQUITY POWER OF COURTS TO DETERMINE AN ABSTRACT RIGHT IS NOT INVOLVED IN THIS CASE. THE COURTS ARE ASKED HERE TO PROTECT AND ENFORCE MOST IMPORTANT AND FUNDAMENTAL RIGHTS, FROM THE PROTECTION AND ENFORCEMENT OF WHICH IMPORTANT RESULTS WILL FLOW.

We are here concerned with a most important and fundamental right—the right of all of the clerical employees of a large and powerful railroad system to work in interstate commerce under a guarantee granted to them by Congress that their services and working conditions shall not be fixed for them, nor disputes relative thereto adjusted, nor settlement made of such matters or questions, without *representation*.

The District Court in this case said:

> "What the complainants are seeking here to enforce is the century-old right of representation." (25 Fed. (2nd) 875.)

The petitioners state that the government and public are not concerned with *who* shall act as representatives of the carriers or employees. The following language of this court in the first Pennsylvania Railway case, 261 U. S. 83,

would seem to be a complete answer to this contention of petitioners:

> "It is evident from a review of title III of the Transportation Act of February 28, 1920, that Congress deems it of the highest public interest to prevent the interruption of interstate commerce by labor disputes and strikes.
>
> * * * * *
>
> "Again, we think that this question of who may be representatives of employees, not only before the board, but in the conferences and elsewhere, is and always has been one of the most important of the rules and working conditions in the operation of a railroad. * * * The Act is to be liberally construed to effect the manifest effort of Congress to compose differences between railroad companies and their employees, and it would not help this effort, to exclude from the lawful consideration of the Labor Board a question which has so often seriously affected the relations between the companies and their employees in the past, and is often encountered on the very threshold of controversies between them."

The District Court also made complete answer to this contention when it said:

> "Nor can there longer be any doubt that Congress had the power to, and that it must, in the interest of public peace and safety, make certain, in the first step in negotiations between railroad employer and employee * * * that representatives of the railroad companies should not meet representatives of the employees, nominally elected by them, but in fact under the influence and control of the railroad companies. I therefore easily find that the legislation in question was not only within the power of Congress to enact, but that it should be liberally construed and applied, so as to give effect to the paramount public convenience subserved by it." (24 Fed. (2nd) 431.)

The ground work of the whole Act of 1926 is that employees may select their own representatives freely and without interference or coercion from the carriers. The

employees are not represented at all unless by representatives of their own free choice. Until such representatives are chosen there is only one party and that is the carrier, and there is no one to start in operation on behalf of the employees the machinery provided for in the Act—there can be no conferences, no mediation, no arbitration, no lawful contract—and the entire machinery provided for by Congress is entirely useless. Surely Congress could not have so intended.

The bill of complaint in this case was not filed to establish rights which might or might not prove of value in the future, but to secure immediate and sorely needed relief from a condition created by illegal acts of the petitioners which was resulting in *immediate* material disadvantages and losses to the railway clerks. The bill of complaint presented an actual situation then existing—a dispute as to rates of pay, et cetera, between the railway clerks and the railroad company—with respect to which Congress had given the railway clerks the right to be heard by representatives of their own choice and selection. At the very time the bill was filed this dispute was pending before the United States Board of Mediation, and U. S. Mediator Pat Neff was in the City of Houston ready and willing to mediate the controversy, but the railroad company was attempting to thwart the mediation proceedings by contending that the Brotherhood was not entitled to represent the railway clerks in its employ. In this connection it is significant that U. S. Mediator Pat Neff arrived in Houston on June 2, 1927, to start the mediation proceedings and that a few days later the revival of the "company union" was instigated. (Rec., 331, 737-738.)

The views expressed by petitioners' counsel in their brief that the right of employees to be represented by representatives of their own choice is but an abstract right, and

valueless, does not at all coincide with the petitioners' own views expressed prior to the filing of the bill of complaint as disclosed by petitioner Lull's letter of May 24, 1927, to President McDonald of the railroad company. (Rec., 772-774.) That letter shows that petitioners considered the employees' right of free choice of representatives worth at least $265,000 per year to the employees, *i. e.*, the difference between $75,000 and $340,000. If the Brotherhood, the free choice of the employees, should continue to represent them, the railroad company expected to have to grant increases totalling $340,000 per year as it had done on its lines west of El Paso. But if the "company union," the choice of the railroad company, were to replace the Brotherhood as representatives of the clerical employees, the railroad company expected to get off with an increase totaling only $75,000 per year through a purported contract, entered into by persons *ostensibly representing the employees but in truth and in fact representing the railroad.* (Rec., 772-774.)

It was the primary purpose of the bill to prevent the petitioners by *influence, interference or coercion* from unseating the employees' free choice as their representative, the Brotherhood. The bill seeks to enable the employees to continue to be in a position to proceed with the mediation proceedings or other proceedings, or to make binding contracts with the railroad, or generally to enable the clerical employees to determine for themselves any or all of these matters. The letter of May 24, 1927, above referred to in effect admits this. (Rec., 773.) This is not idle talk or fancy—we need only refer to the record in this case. The "company union" had no sooner been seated by the petitioners in place of the Brotherhood as representative of the employees, than it on August 20, 1927, just 17 days after the entry of the temporary injunction, entered into a purported

wage agreement with railroad company for relatively small wage increases totalling only $100,000 per year for the entire railroad system (Rec., 700-701) and made no attempt to proceed with the mediation proceedings or other proceedings to secure the larger wage increases desired by the employees and which *they were entitled to at least contend for*, through duly authorized agents.

And there are many more examples, such as matters involving discipline, vacations, seniority and hours of service, where it is of great importance to employees to be represented by representatives of their own choice. The bill in this case set forth a *valid contract already existing between the very parties to this suit.* (Rec., 37-38.) This contract was admitted by petitioners. (Rec., 416, 419-430.) Respondents set up in their bill threats by the railroad to discriminate against individual members of the Brotherhood of account of their membership in a labor union, which discrimination was in violation of the contract, as well as contrary to the Act of Congress. The bill alleged further property rights arising from this contract, as well as arising independently of it. (Rec., 38-39.)

It must be altogether clear that there are involved here all of the rights for the protection of which *employers* have so often contended. Is it not at once apparent that all of the clerical employees of a large railroad system extending through two states are seeking here to protect their right to work and to continue to work under the conditions guaranteed them by Congress? Can there be any question but that there is involved here the most important right of *liberty of contract* and a fundamental right of property? Does not the bill here seek the protection of the courts against the worst form of fraud and coercion—prohibited by an Act of Congress and practiced in violation of that Act and persisted in flagrantly after a court had

restrained it? Is there any distinction in principle between restraints against unfair competition (so often enforced by our courts) and restraints to insure freedom of contract?

Petitioners take the position in effect that in order for rights to be enforceable, their enforcement must lead to definite, pecuniary benefits actually realized—in hand, now. They seem to argue that unless it appears that a huge increase in pay or some like benefit will result forthwith from this suit, then the courts are powerless and impotent to enforce the plain terms of an Act of Congress. They overlook the fact that most of our cherished rights are frequently merely abstract in many ways. We have the right to be heard by counsel of our choice, but we may pick unwisely and might do better without counsel. We have the right to be confronted with witnesses against us, but the witnesses may testify to facts that will convict us. We have the right to testify, but our testimony may damn us in the eyes of all who hear. We have the freedom to go where we may, but this very freedom may make mere "rolling stones" of us. And we might go on and on with innumerable rights, the enjoyment of which never leads to the sort of definite results which petitioners contend must follow the enforcement of rights.

In passing upon this very question, this court, in its majority opinion in *Coppage* v. *Kansas* (236 U. S. 14, 59 Law Ed. 446), held:

> "The principle is fundamental and vital. Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty, in the long-

established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money."

Petitioners make no new contention. Time and again such efforts have been made in this court. Article III of our Federal Constitution gives this court original jurisdiction of controversies between the states. In many such cases, the question of jurisdiction has been stubbornly contested, and although jurisdiction was exercised, we have found no provision of our Constitution nor our statutes for the use of force under order of this court for carrying out its decrees of this character. Where is any such provision under which effective force could be used to enforce a decree of this court in the face of serious resistance by the states? Time after time a state made a defendant in such cases has objected on the ground that since there is no way of *enforcing* a decree, such decree should not be *entered*. Yet when such objections have been overruled and judgment rendered, the decrees have been carried out faithfully.

This situation was present in the case of *Virginia* v. *West Virginia*, 206 U. S. 290, where the defendant state claimed that this court had no power to *enforce*, and therefore no power to *render*, any final decree. There the then Chief Justice of this court said:

> "It is not to be presumed on demurrer that West Virginia would refuse to carry out the decree of this Court. If such repudiation should be absolutely asserted we can then consider by what means the decree may be enforced."

This case was indeed fraught with possibilities for trouble. Bitter feeling was on both sides. Yet it is inconceivable that the Federal Government would have used force in aiding Virginia to collect. And still this court has ren-

dered its judgments in many such cases and in many other cases in which it sounded plausible to urge the same contention that petitioners make here.

We venture the statement that petitioners will not repudiate the decree of this court and if the question were to be put squarely to them they would admit their willingness and readiness to obey the orders of this court—even in the face of their conduct towards the lower court as reflected by the record in this case.

Petitioners state that "whether or not 'better wages' and 'better working conditions' will in the future be granted to these plaintiffs, or any of them, rests entirely within the control of the defendants." (Petitioners' brief, pp. 98-99.) In other words, they can continue their *arbitrary disregard* of the plain terms of a statute which requires them,

> "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." (Quoted from the very section of the 1926 Act involved here.)

At page 100 of their brief petitioners say: "The court in so holding" (that an employee had a property right to work in interstate commerce) "ignored the fact that petitioners had the unquestioned right to fix wages and working conditions of employees without any representation on their part." Petitioners themselves ignore the fact that under Section 6 of the Act carriers are bound to give 30 days' notice of any intended changes in rates of pay to representatives of employees; and where a wage controversy is before the Board of Mediation they are prohibited

from making any change in rates of pay until the Board has disposed of the matter.

This Act imposes solemn responsibilities upon petitioners in addition to the moral responsibilities involved in their trusteeship arising out of the operation of a public utility. Morally, the power to do good imposes the obligation to do it. Of course, petitioners can disregard the fact that the misuse of powers results in their decline. They can forget the truism that the heart which habitually withholds quickly loses its power to receive. They can continue their present course and leave the world no better than they found it.

But the history of the world fails to furnish the name of a single person who won the crown of content along the line of misanthropy. And we are sure that petitioners know quite as well as we do that, judged by its fruits, benevolence remains the crowning faculty of the mind. Yes, these observations are directed toward the purely moral question presented by the conduct and attitude of the petitioners. But is not the party to a controversy who is *morally* wrong frequently proven *legally* wrong? Can a person who boasts of his power and ability to disregard the plain terms of a statute, and who is known to have defied the orders of a court, stand in a court of equity with "clean hands"—so essential in such presence?

Petitioners naively state (Petitioners' brief, p. 99) that "the Brotherhood bargaining collectively, was *unsuccessful* in negotiating a new contract for the clerical employees, while the Association, bargaining collectively, was *successful*." Then petitioners add "the Brotherhood can still bargain all it pleases, but no one would assert that the Company is bound to contract." (Petitioners' brief, p. 99.) Thus they exhibit the attitude which has characterized their

actions throughout this entire controversy. Their statements in this respect evince the same variety of judicial fairness (!) that characterized their conduct in determining that the Company Union represented a majority of their clerical employees, and that it should be recognized rather than the Brotherhood. Just as well suggest that each and every decision made in a ball game by an umpire who was the most ardent "fan" of one of the contestants would be judicially fair and impartial! Or perhaps a splendid illustration of this sort of judicial fairness would be furnished by letting the most partisan solicitor in this case decide the entire matter.

POINT IV.

In reply to Petitioners' Points 6 and 7.

Petitioners' Point 6 (page 104 of their brief) contends that their recognition of the "company union" did not violate the injunction. Under Point 7 (page 112 of their brief) they claim the contempt decree broadened the injunction and was retroactive. To these claims we say:

THE RECOGNITION OF THE "COMPANY UNION" UNDER THE CIRCUMSTANCES WAS CONTRARY TO THE STATUTE, AND THE INJUNCTION OF THE DISTRICT COURT ENJOINED THE PETITIONERS IN EFFECT FROM VIOLATING SUCH STATUTE. THE CONTEMPT ORDER IN NO WAY BROADENED THE INJUNCTION AND WAS NOT RETROACTIVE IN EFFECT.

Boiled down and much extraneous matter put aside, the substance of these contentions by petitioners appears to be that the temporary injunction did not prohibit the petitioners from recognizing the Association; that the recognition of the Association was not a violation of the temporary injunction even if such recognition would have been such

violation under ordinary circumstances as the organization of the Association was almost complete at the time of the issuance of the temporary injunction; that the recognition of the Association was made in good faith and that petitioners did not "dream" that same would amount to a violation of the injunction; that the Association was authorized by a majority of the clerks to represent them; and that the contempt order broadened the injunction and punished for things that the injunction did not prohibit.

We found it necessary to ferret out the foregoing contentions from the mass of argument and alleged facts (many of which are not facts and are set forth without any basis in the record in this case) literally thrown together in Points 6 and 7 of petitioners' brief so that we would be in position to make an intelligible answer to these points. We have thought that it might assist the court in considering petitioners' contentions if we set forth our summary (gleanings) of them.

The interruption of commerce has been held to be a public nuisance, *In re Debs*, 158 U. S. 564, and by the Railway Labor Act of 1926 it was the evident purpose of Congress to devise a means or machinery to prevent disputes between carriers and their employees from resulting in strikes that would stop the movement of interstate commerce and seriously injure the general public. In the first paragraph of the second section of the Railway Labor Act it is said in so many words that it is the duty of the employers and employees to settle their disputes "in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and employees thereof."

The petitioners in this case apparently believe that there is no duty resting upon them save such as can be brutally enforced. They have attacked the validity of this statute

because they would not try to amicably settle their disputes with their employees. No one can deny that those engaged in moving interstate commerce, being the recipients of extraordinary powers such as eminent domain, etc., and on whose efforts depends the welfare, the prosperity and practically the lives of the millions who are interested in having the operations of the carriers uninterrupted, are under a moral duty to make every reasonable effort to settle disputes that may result in the stoppage of the operations of the carriers. *By this Act of Congress, the moral duty received the sanction of law and became a legal duty.*

We ask the court to note that at the time of issuance of the temporary injunction and also at the time of the recognition of the "company union" by the railroad company the clerical employees were insisting on an increase in pay and the petitioners had not conceded the increase. The identical situation had arisen that the statute had been enacted to meet. The first thing necessary for conferences, mediation proceedings, etc., was for representatives to meet and negotiate. And the very first requisite of any representative is that he be truly representative. Now in this case it was the belief of your respondents, established to the satisfaction of the District Court, that the "company union," though it might constitute a device like the kid's skin on the hands of Jacob, so that to the blind the hands would be those of Esau, yet being company made, it would speak with the voice of Jacob.

That the "company union" was company made, is too clear for words. It was to the great advantage of the railroad company to be represented on "both sides of the table, its own side, and that of its employees," so that it could absolutely control the result. The proof was conclusive that the company was interested and active in creating and

fostering the "company union" to pretend to represent the employees. This was certainly designed to make such a "company union," so promoted and fostered by the company, truly representative of the **interests of the company** rather than possessed of that independence necessary to represent fairly the interests of the employees that were adverse to the interests of the company. Such conduct was clearly violative of the Act of Congress in that the company was thereby *interfering, influencing and coercing* the employees. And the company takes the position that it had the right to encourage the setting up of a union friendly to itself, in other words to determine the character of the representation of the employees with whom it would deal.

Further, the petitioners claim, in effect, that they had already set the powder train and applied the match at the time the injunction was granted and that the explosion that followed after the injunction, resulted from their acts theretofore committed. They further claim that the recognition of such company union was not unlawful and not enjoined. It was the recognition of the "company union" by the company as the *only* organization with which it would deal in the future and refusal to deal at all with the employees' union (Brotherhood) that were in flagrant violation of the third paragraph of the second section of the Railway Labor Act. It was a **designation by the company of the sole representative of the employees with whom it would deal.** Without this act of recognition the "company union" would have fallen like a house of cards. It was the one thing that brought to full fruition the company's acts of coercion, and was a ratification of its former acts and contumacious disregard of the letter and spirit of the law and the court's injunction. It was the very thing which respondents complained, at the hearing on the tempo-

rary injunction, would happen if petitioners were not restrained, and was what the court had in mind in granting the temporary injunction. Indeed, the recognition by the company of the "company union" as the *only* representative of the employees with which it would deal, was itself an attempt to abolish the Brotherhood and to render the court's action moot, and to destroy the status of the employees' union (Brotherhood) *pendente lite*. It was as though during litigation a person bought property that was the subject of a suit but claimed to be an innocent purchaser. This attempt to forestall the final action of the court would have been practically a contempt of court, even if there had not been a temporary injunction forbidding this very thing. The District Court made complete answer to petitioners in its opinion denying the motion to vacate the contempt order as follows:

> "While I think the continuing character of the obligation not to interfere which the statute imposes on the company completely refutes defendants' position, and that this is so plain as not to admit of argument, upon the further ground that the matter was not a *fait accompli* when the injunction was issued, but had only begun, and that the effective interference with self-organization and the designation of representatives which really made itself felt occurred after the injunction was issued, this contention must be denied. See *Texas & New Orleans R. R.* v. *North Side Railway*, 48 S. Ct. 361, 72 L. Ed. 661 (April 9, 1928.)" (Rec., 389, Appendix 46.)

Petitioners take the position that they really believed that their union more clearly *represented* the *best element* of its employees and accordingly they had the right to recognize such union. It may be that the *company* believes that the best element of its employees are those that are the most submissive to it. But the purpose of the Act was primarily to allow the *employees* to determine who should represent them. If the employees are r truly

represented by representatives of their own selection, then Congress has labored in vain. The petitioners cannot seem to get the idea that this statute was enacted for the benefit of the public and that the public has the right to have its commerce move without interruption and to declare through Congress how the carrier and its employees shall conduct their disputes and how they shall attempt to adjust them. The public suffers and bears the burdens when railroad strikes happen.

The action of the company was clearly violative of the statute and injunction even if it truly believed it was making a better and wiser choice than the employees made for themselves. But we do not believe, and the trial court did not believe, that the company cared about promoting the *best* representation for the employees. Under the law, expressing established principles of agency, it would seem that *bona fide* representation would be the *best*. The company knew, and was bound to know that it was altering the *status quo* between itself on the one hand and the Brotherhood and the clerical employees on the other hand. It was within the province of the trial court to determine whether or not in thus deliberately changing the *status quo* the company was acting contumaciously.

It seems impossible for anyone not simple minded to believe that the company by formally refusing to recognize the Brotherhood and formally recognizing its own union did not do so with the deliberate purpose of seeking to nullify any action the court might take in the case then pending before the court. It was bound to know that by trying to depose the employees' union that it was **interfering with the designation of the representatives of the employees.** When a party to an injunction doubts its extent or significance, he cannot disobey or disregard it with a view to testing it in this particular, but he must apply to

the court granting it for a modification or construction of it. *Wells* v. *O. R. & N. Co.*, 19 Fed. 20. Good intentions and good faith are immaterial in civil contempt proceedings. *Indianapolis Water Co.* v. *American Strawboard Co.*, 75 Fed. 975; *In re North Bloomfield Gravel Mine Co.*, 27 Fed. 799; *Robinson* v. *Lederer Co.*, 146 Fed. 993. Advice of counsel is no defense. *In re Home Discount Co.*, 147 Fed. 538; *Pokegama, etc., Lumber Co.* v. *Lumber Co.*, 86 Fed. 539.

Petitioners make much of the statement in Torian's affidavit filed on the hearing on temporary injunction wherein he advised the court of what petitioners *proposed to do*, saying that the petitioners only did after the issuance of the injunction what they had advised the court they proposed to do, and accordingly they acted in good faith. The difficulty with their proposition is that the District Court told them they should not do what they proposed to do, and they went ahead and did it anyway.

Again, the petitioners say they acted in good faith in recognizing the "company union" on August 6, 1927, just three days after the entry of the temporary injunction, by reason of the "company union" holding the authorizations of a majority of the clerical employees. The difficulty with this proposition is two-fold. First, the "company union" did not hold the authorizations of a majority of the clerical employees. The District Court said: "I think it plain that there were not sufficient authorizations of those qualified to vote, to constitute a majority." (Rec., 261.) Second, what authorizations it did hold had been obtained by reason of *influence, interference and coercion* by petitioners, and the District Court held that such authorizations were not a proper means for designating representatives. (Rec., 80, 261.) On pages 186-219 of the record in this case appears a careful analysis of the authorizations to the

"company union," and it clearly shows that the "company union" held the authorizations of *far less* than a majority of the clerical employees. The District Court so found. (Rec. p. 261.) On the other hand, the Brotherhood had been the recognized representative of the clerical employees for 9 years (Rec. pp. 815-819), and on July 29, 1927, just 8 days prior to the recognition of the "company union," there had been offered in evidence in this suit without objection from the petitioners 1,125 authorizations of said clerical employees to the Brotherhood to represent them. (Stipulation, Rec., 453.) Petitioners' brief contains many misstatements concerning the membership in the Brotherhood and the Association, but this is immaterial as the question of *membership* can have no bearing on the issues here presented. An organization of 10 members might be chosen by a large body of employees to represent them in preference to an organization with 1,000 members, provided a majority of the employees voted to have the smaller organization represent them in handling their affairs with the employer—the question is one of *authorization* and not simply of *membership.*

At pages 112-113 of their brief petitioners say that representatives under the Railway Labor Act of 1926 do not have to be chosen by a majority of the employees. This present attitude does not jibe well with the position taken in petitioner Torian's letter quoted on page 24 of petitioners' brief:

> "At conference yesterday I advised that the carrier would comply with Decision No. 1971 of the United States Railroad Labor Board, and recognize the organization of the Brotherhood of Railway and Steamship Clerks until such time as the majority of the clerical employees by secret ballot selected other representation, but that the carrier did not feel that the present minority representation of the clerical employees was fair to either the employees or the railroad."

Petitioners make the contention at page 109 of their brief that at the time they recognized the Association, the mediation proceedings before the U. S. Board of Mediation had ended. The District Court disposed of this contention in short order as follows:

> "Not only did the railroad company, with a sheer and gratuitous wantonness of spirit, *reject the offices of the Board of Mediation,* created and operating under this same Act, before whom, at the time of the filing of this suit, a wage dispute initiated by the Brotherhood was pending* but"* * * it nullified the injunction.

While it would seem to respondents that the recognition of the "company union" under the circumstances was sufficient basis for the contempt order, we point out that this was but one of the many violations of the temporary injunction by the petitioners, despite the contentions made in their brief that upon the entry of the temporary injunction all activities complained of upon their part ceased. That the District Court found otherwise is clear from its opinion holding petitioners in contempt. (Rec., 256-261.) That the Circuit Court of Appeals found otherwise appears from its opinion:

> "Evidence in support of the allegations of the information included evidence to the effect that *after the injunction was issued* the Railroad Company, acting

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*G. S. Wald, by telegram of August 2, requested the Board of Mediation to relinquish jurisdiction. This request, by telegram of August 4 the board declined, and on August 4 Wald telegraphed the board as follows: 'Brotherhood of Railway and Steamship Clerks does not represent a majority of our clerical employees, and we will have no further dealing with them. We are satisfied can make amicable adjustment with Association of Clerical Employees Southern Pacific Lines, which does represent majority of clerical employees, and it is the opinion of our counsel, after careful consideration of the law, that there is nothing in the law or in our present situation which can or should prevent us from reaching agreement with organization last mentioned. The inference in your telegram that we can deal only with the Brotherhood seems to us and our counsel to be obstructive, rather than helpful.' And thereafter its offices were ignored and its tender of continuing services of September 28 to A. D. McDonald, President, and of October 11 to H. M. Lull, Vice-President, were declined." (Rec., 256.) (Note.)

through agents authorized by it, brought to bear upon clerks in its employ who were members of the Brotherhood or eligible to membership therein influence and pressure, including promises and threats, to induce such employees to renounce the Brotherhood as the representative of such clerks in dealing with their employer as to rates of pay, rules and working conditions, and to consent to the Association being the representative of such clerks in such dealings; permitted employees to devote their time and services to activities for the Association without deduction from their pay while they were so engaged, but docked the pay of employees who were members of the Brotherhood for time used in the service of the Brotherhood, deprived of passes employees who, while on leave of absence without pay, acted as officers of the Brotherhood, and dismissed from the service employees who acted for the Brotherhood, because they so acted." (Rec., 1142.)

The District Court, in its various opinions, has set forth, amply supported by numerous references to the evidence, numerous acts of the petitioners in contempt of the temporary injunction. We will only refer to a few of such contemptuous acts, giving the references in the Record where the supporting evidence may be found. The District Court points out that the genesis and motive of the entire activity of the petitioners in organizing, promoting and maintaining the "company union" and in endeavoring to disrupt and unseat the Brotherhood as representative, is made clear and plain through a letter written by petitioner Lull, Vice-President of the company, to President McDonald of the Company, on May 24, 1927, just prior to the activities complained of in this suit. (Rec., pp. 772, 396-398.) That letter in brief declared that there was pending from the Brotherhood a request for an increase in wages of 10 cents per hour, which has been referred by the Brotherhood to the Board of Mediation, after the failure of conferences; that it was practically certain, if the matter went

to arbitration, an award would be rendered increasing the payroll $340,000 per annum; that he proposed to refuse mediation and arbitration upon the question of the right of the Brotherhood to represent the employees, and stated: "This will permit us to get away from the interference of this organization (Brotherhood), and if successful in this I am satisfied we can make settlement with our own employees at a cost not to exceed $75,000 per annum." (Rec., pp. 772, 396-398.)

As the District Court stated (Rec., 396-7), every proceeding taken thereafter sprang from and may be read in the light of this program, which explains the vigorous and determined effort to seat the "company union" as sole representative of the employees, and gives color to the persistent efforts thereafter to destroy the influence and activity of the Brotherhood. Is this not sufficient answer to the contention made many times in petitioners' brief that all activities in connection with the organization and maintenance of the Association were upon the part of mere clerks and three agents and were known only to officers of the company of the rank of division superintendents or lesser rank?

The District Court points out that organizers of the "company union" were sent out on the company's time, and on the company's pay, and with its consent and approval, to organize the Association. These organizers were permitted to devote all their time for many days and part of their time over a long period to this organization work, and received their full pay during this time from the company. That officers and agents of the company did not devote merely their "spare time" to organizing and seating the Association appears clear from the following extract from the testimony of petitioner G. S. Waid, Vice-President and General Manager of the company, in answer

to questions by the District Court, set forth in the District Court's opinion in the contempt proceedings:

"Q. Isn't it a very unusual situation for the company to have men active like that, not doing any work, and still carrying them on the payroll?

A. No; we frequently detach men from the service for the purpose of handling matters that are for the general good. For instance, we send men to an organization for fuel conservation each year.

Q. I do not mean that; I mean in these employees organizations. Was there ever a case before where the railroad company kept a representative of the employees on the payroll, and allowed them to stay there without working? Not any case before?

A. Oh, I presume there have been, where they were doing work that was worthy of consideration.

Q. I know, but the work they are doing is not worthy of any consideration by the company is it—company work?

A. Yes; it is very much in the interest of the company to secure a proper representative of interests; and I should think that the company would be very much interested in that.

Q. So these men are really working for the company in organizing and promoting this Association?

A. No; I would not say that they are so employed.

Q. What do you say?

A. They merely go, so far as I know—

Q. What I mean, you said they were doing work which is greatly to the interest of the company in promoting and insuring friendly organizations; that is correct?

A. Yes, that is correct. We feel so.

Q. And you are maintaining them still on the payroll in order to enable them to do that?

A. I have not said they are on the payroll.

Q. I am asking you.

Mr. Tallichet: If it will clarify the situation, I will say that I got the information, not from Mr. Waid,

but Mr. Torian, that we have made no deductions whatever from the pay of these men." (Rec., 260.) (Note.)

This organization work continued long after the entry of the temporary injunction, the organizers being engaged in getting *members* in the "company union", and not merely authorizations as before the injunction, as claimed in petitioners' brief. (Rec., pp. 138, 459, 513-515, 615-616, 741-8, 758, 1020.) There is no proof whatever in the Record to substantiate the "surmises" appearing at page 107 of petitioners' brief that members of the Brotherhood engaged in activities in its behalf on the company's time and pay. The chairman of the "company union" *rendered written reports* concerning the progress of the "company union" *to J. G. Torian*, assistant to Vice-President and General Manager of the company, and *asking for information and instructions.* (Rec. pp. 381-3, 785-791.)

On the other hand, as the District Court points out, the general chairman, Harper, and general secretary-treasurer, Walker, of the Brotherhood, were discharged from the company's service without cause and without notice (as to Harper, Rec., pp. 138-140, 459, 518, 622-3, 658, 659-660, 797-800; as to Walker, Rec., pp. 140-141, 459, 501-3, 660, 797-8, 800-803), and their passes over the company's lines cancelled (as to Harper, Rec., pp. 518, 623-5, 659-660, 795-798; as to Walker, Rec. pp. 501-503, 518, 661, 797-8), despite the fact that they had been granted indefinite leaves of absence for the express purpose of performing such services, and that the company's Vice-President and General Manager, Waid, testified that it was usual and customary for such officers of railroad unions to be continued for years on such leaves of absence, to have pass privileges, and when their services as such officers of the unions terminated they were given the opportunity to go into the actual service of the

company without loss of seniority rights. (Rec., pp. 508-513, 602-613.)

Also, as the District Court points out, members of the Brotherhood had their pay docked for time spent in conferring with the company's Executive Vice-President Lull (Rec., pp. 694-5), and other members of the Brotherhood have been dismissed from the company's service. (Rec., pp. 495-8, 670-2, 498-9, 491-4, 672-7.)

Another glaring instance of violation of the temporary injunction pointed out by the District Court was the exclusion of representatives of the Brotherhood from wage conferences. On September 28, 1927, there was held in the Division Superintendent's office of the company at El Paso, Texas, a conference to revise the wage scale of clerical employees of the El Paso Joint Terminal, part of whom were employees of the Pacific System of the Southern Pacific Lines, and part employees of the petitioner company. The employees of the Pacific System were represented at said conference by representatives of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees—Southern Pacific Lines, Pacific System, but J. G. Torian, assistant to Vice-President and General Manager of the petitioner company, caused H. W. Harper, General Chairman of the plaintiff Brotherhood, who held the *specific authorizations and instructions of the majority of the clerical employees of that company in said El Paso Joint Terminal to attend said conference and represent them*, to be excluded from said conference by physical force, and admitted to said conference to represent said clerical employees representatives of the "company union" who did not hold the authorizations or instructions of *any* of said clerical employees to represent them at said conference. (Rec., pp. 123-134, 459, 504-507, 656-657, 821-822.)

The Record fairly bristles with further evidences of violation of the temporary injunction, many of which are not referred to in the District Court's opinion, but we will not burden the court further in this connection.

The petitioners contend in their brief that the present suit is a fight between the Brotherhood and the Association; that the injunction prohibits the clerks who are not members of the Brotherhood from forming a new union; and that those clerks that are not members of the Brotherhood are left without any right of representation or other rights. The falsity of these contentions will appear from a glance at the temporary injunction and at the opinion of the District Court denying the motion to vacate the temporary injunction. In the temporary injunction it is provided:

> "Nothing in this injunction shall be considered or construed as authority to prevent any employee of said defendant Railroad Company, in the class referred to, from organizing, joining, promoting, or fostering as many unions as he or they (meaning such employees in the class referred to) may desire, and in any way which he or they may desire, and with the assistance and aid of any of his fellow employees in any way and to any extent that said fellow employees (in the class referred to) may desire"; (Rec., 84).

In the opinion referred to the District Court said:

> "Nothing in the decree requires the railroad company to recognize the Brotherhood any longer than such time as its employees, or some of them, in the exercise of the right granted them by the Act, shall see fit to have the Brotherhood represent them, with the full right in the employees, or any amount of them, either by secret ballot under the direction of the court, or in any manner which they may determine, to select another or other representative.
>
> The status restored was disturbed by the railroad company, in violation of the law and of the injunction. From disturbing this status the railroad was and

is expressly enjoined by the statute and the order of this court. The employees, however, not only have the right, but the right is expressly recognized in them, to appoint and establish any representative or representatives they may choose, the Association, or any other, so long as, and provided only, that the railroad takes no part or parcel in this selection." (Rec., 392.)

The District Court in the same opinion completely answers the contention of petitioners that the contempt order in requiring the disestablishment of the Association as constituted enlarged the temporary injunction, as follows:

"As to the defendants' complaint that the contempt order has gone further than the injunction, and that the court has thereby assumed a jurisdiction beyond the terms of the statute, I think it sufficient to say that the contempt order has done nothing more than in the recognized jurisdiction of the court, to restore the *status quo ante*, except in one particular which will be later noted. So clear is this power to restore the status that it has even been held that where a defendant with notice of filing of a bill of injunction proceeds to complete the act sought to be enjoined, the court may, by mandatory injunction, compel the restoration of the *status quo.*" *Texas & New Orleans R. R.* v. *North Side Belt R'y*, 48 S. Ct. 361, 72 L. Ed. 661.

"In directing the railroad to disestablish the Association of Clerical Employees as it is now constituted as the recognized representative of the clerical employees of the railroad company, the court merely restored the status which existed at the time of the granting of the injunction, at which time this Association was in the process of formation, its representative character had not been established, and since that Association had been formed and promoted by the interference of the defendant company, and its recognition brought about as the effective act in such interference in violation of the injunction, the court properly directed the railroad company not to recognize it as representative as presently constituted and established, leaving to the employees the right by secret

ballot, or by any other way they desire, uninfluenced by dictation or interference by the defendant company, to select the Association, if they chose, as their representative." (Rec., 390; Appendix, 46-47.)

POINT V.

In reply to Petitioners' Points 8, 9 and 10.

THE PETITIONERS, HAVING VIOLATED THE COURT'S TEMPORARY INJUNCTION ISSUED TO PRESERVE THE STATUS QUO UNTIL THE COURT COULD DECIDE THE CONTROVERSY THEN PENDING, THE COURT WAS CLEARLY AUTHORIZED TO REQUIRE THE CONTEMNERS, AS A CONDITION OF PURGING THEMSELVES OF CONTEMPT, TO DO SUCH ACTS AS WOULD IN EFFECT NULLIFY THE CONSEQUENCE OF SUCH CONTEMPT AND RESTORE THE STATUS QUO.

Petitioners in their Point 8 (page 121 of their brief), Point 9 (page 125 of their brief), and Point 10 (page 127 of their brief) evidently misconstrue the law of contempt and the scope of a remedial order which may be entered on contempt proceedings to restore the *status quo ante*. Courts of equity are almost unlimited in their power in contempt proceedings to enter remedial orders restoring the *status quo ante*, and to wipe out the effects and results of disobedience. They may require defendants to do things to purge themselves of the contempt and to restore the status which they could not order in the first instance to be done by injunction. Things which may of themselves be innocent and the doing of which could not in the first instance be enjoined, may be ordered undone where necessary to restore the *status quo ante* if they were done coincident with or as part of the plan or actions resulting in the violation of the injunction. Anything and everything done by defendants in contempt proceedings may be ordered undone *if necessary to secure, or rather to restore, to the*

adverse party its rights, and the protection of them for which the injunction was issued.

Also the doing of a thing which may be legal in and of itself, may become illegal when done in aid of a conspiracy to accomplish an illegal object, or as part of a general plan to violate a statute. Let us assume, for sake of argument only, that Harper, Walker, Stotzer, Hudson and Ginsburg were legally discharged, if their discharges were considered apart from the other matters in this case. Stotzer's discharge, for instance, may have been for cause and entirely legal when considered by itself, but when taken as a part of a conspiracy or illegal plan to interfere with the right of the employees as a whole to self-representation, by destroying their morale, it becomes illegal and a violation of the injunction, as found by the District Court.

In *Swift & Company* v. *United States*, 276 U. S. 311, it was held by this court that where a court has jurisdiction over a subject-matter and of the parties, even gross error in the decree would not render it void. The power to enjoin includes the power to enjoin too much.

The nature and purpose of a remedial order are set forth by this court in its opinion in *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 328;

> "On the other hand, if, in the progress of a suit, a party is ordered by the court to abstain from some action which is injurious to the rights of the adverse party, and he disobeys that order, he may also be guilty of contempt, but the personal injury to the party in whose favor the court has made the order gives a remedial character to the contempt proceedings. *The punishment is to secure to the adverse party the right which the court has awarded to him.*"

As to the power of a court of equity to restore the *status quo ante*, we cite *Texas & New Orleans Railroad Co.* v. *North Side Belt R. Co.*, 276 U. S. 475, where this court said:

"For where a defendant, with notice of the filing of a bill for an injunction, proceeds to complete the acts sought to be enjoined, the court may, by mandatory injunction, compel a restoration of the *status quo*. *Tucker* v. *Howard*, 128 Mass. 361, 363; *Platteville* v. *Galena & S. W. R. Co.*, 43 Wis. 493, 506, 507."

See also:

Eilenbecker v. *The District Court of Plymouth County, Iowa*, 134 U. S. 31.

Gompers v. *Buck Stove & Range Co.*, 221 U. S. 418, 441-451.

Ex Parte Savin, 131 U. S. 267, 276-280.

In Re Debs, 158 U. S. 564, 594-600.

Howatt v. *Kansas*, 258 U. S. 190.

Petitioners contend that the court had no authority to issue the injunction, and for that reason no right to punish a violation of the order, but in *Gompers* v. *Buck's, etc.*, 221 U. S. 438, this court held:

"The court's protective and restraining powers extend to every device whereby property is improperly damaged or commerce is illegally restrained. To hold that restraint of trade under the Sherman Anti-Trust Act, or on general principles, could be enjoined, but that the means through which the restraint is accomplished could not be enjoined would be to render the law impotent."

For this reason and upon the ground that Congress had established a means of settling disputes that might interrupt commerce and had made the representatives of the employees, freely chosen, a part of the legal machinery to prevent strikes which often had interrupted commerce or the operations of carriers, which means so adopted by Congress could be protected by the powers of the court so that the law would not be rendered impotent, and upon the other

grounds heretofore given, it is clear that the court had jurisdiction to issue the injunction.

Of course, the District Court had the general power to issue injunctions in equity, and even if its exercise had been erroneous, which, under the authorities heretofore given, it was not, such injunction was not void. It was for the court in the first instance to determine whether to grant the injunction, and until its judgment was reversed by orderly review, either by itself or a higher court, its orders, based on its decisions, were to be respected, and disobedience to them was contempt of its lawful authority, and punishable. (*Howatt* v. *Kansas,* 258 U. S. 181, 189, and the authorities there cited.)

The court to vindicate its authority could punish the contempt or permit defendants to purge themselves by undoing the acts done by them and by restoring the *status quo,* and thereby could restore to plaintiffs the rights secured to them by the court's order, thereby remedying the results of the defendant's disobedience.

The Circuit Court of Appeals said in its decision (33 Fed. (2nd) 13, 17):

> "The action of the court in the contempt proceedings in imposing condition to the purging of the contempt found to have been committed did not go beyond requiring the undoing of what had been done in violation of the injunction. In dealing with the situation created by violations of the injunction, it was permissible for the court to provide for the restoration of the *status quo. Texas & N. O. R. Co.* v. *Northside Ry. Co.,* 276 U. S. 475, 48 S. Ct. 361, 72 L. Ed. 661."

See also the opinion of the District Court, 25 Fed. (2nd) 877-878, where the matter of restoration of the *status quo* is discussed at length.

POINT V-A.

The injunctions, temporary and permanent, are in proper form.

Both the temporary and permanent injunctions follow closely the wording of a paragraph 3 of Section 2 of the Railway Labor Act of 1926, and are not in such general language as to keep petitioners in constant jeopardy of contempt as charged in Point 10 of petitioners' brief. They, in simple, clear language, enjoin the petitioners from in any way or manner interfering with, influencing, intimidating or coercing the clerical employees of petitioner railroad company with respect to their free and untrammeled right of selecting and designating their representatives and of self-organization. There would seem to be nothing in the injunctions which is open to misunderstanding. All the words and phrases used are those of long and well established meanings. No elaboration or particularization would make any more clear the meaning of the phrases "free and untrammeled right of selecting and designating their representatives" or "free and untrammeled right of self-organization." The phrases are not novel or ambiguous. They are so easily understood that they "speak" their own meaning. It would be beyond the limits of human endeavor to specify in an injunction each and every particular act or each and every particular combination of particular acts which would constitute interference, influence, intimidation or coercion with respect to the foregoing rights. Acts which when taken by themselves may be entirely lawful, when bound together as parts of a plan may become unlawful. In other words, the wrongful plan may make the parts unlawful. A person is bound to know when his acts constitute interference, influence, intimidation or coercion.

Petitioners have not complained of the temporary injunction, *and have leveled no assignments of error alleging error in granting the temporary injunction in the form granted.* Any defects in the temporary injunction could have no possible bearing on the issues presented on this appeal. If the temporary injunction was too broad or sweeping, or too vague, the petitioners' remedy was to apply to the District Court for modification or to appeal but not to disobey its plain terms. So long as the District Court had jurisdiction of the subject-matter and of the parties, which is not disputed here, its injunction was not void, no matter how erroneously or improvidently it might have been issued, and its order had to be obeyed until modified or set aside by the District Court or on appeal. So here, even if this court were inclined to hold that the District Court should not have issued the temporary injunction, the contempt proceedings would not be affected because the petitioners clearly violated the temporary injunction which was not void and accordingly they must answer for such violation. The District Court had almost unlimited discretion in prescribing the punishment for violation of its injunctions and this court will not modify or set aside any such punishment unless the District Court has *grossly abused* its discretion.

The petitioners endeavor to read into the injunctions issued by the District Court the provisions of the contempt order. The contempt order is not in any way an enlargement or extension of the original injunction, but simply a holding and decree that the petitioners had in fact, and with deliberate purpose and design, knowingly violated a solemn order of the District Court. The contempt order then provided certain *conditions* upon which the petitioners might *purge* themselves of such contempt.

The following authorities fully support our position as

above set forth and state principles decisive of various issues involved on this appeal:

In *Swift & Co.* v. *United States,* 196 U. S. 396, this court said:

> "The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately, when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. *It is suggested that the several acts charged are lawful,* and that intent can make no difference. *But they are bound together as the parts of a single plan. The plan may make the parts unlawful. Aikens* v. *Wisconsin,* 195 U. S. 194, 206, *ante.* 154, 25 Sup. Ct. Rep. 3."

In the *Debs* case, 158 U. S. 594, this court said:

> "But the power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency."

In *Swift & Co.* v. *United States,* 276 U. S. 311, this court said:

> "It is contended that the decree is void because the injunction is not limited to acts in interstate commerce.
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> * * * * *
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> "Again, the argument fails to distinguish an error in decision from the want of power to decide. The allegations of a conspiracy to obstruct interstate commerce brought the case within the jurisdiction of the court.
>
> * * * * *

"If the court, in addition to enjoining acts that were admittedly interstate, enjoined some that were wholly intrastate and in no way related to the conspiracy to obstruct interstate commerce, it erred; and had the defendants not waived such error by their consent, they might have had it corrected on appeal. But the error, if any, does not go to the jurisdiction of the court. *The power to enjoin includes the power to enjoin too much.*"

To similar effect are:

American Cigar Co. v. *Berger*, 221 Ill. App. 285.

Morris Fertilizer Co. v. *Boykin*, 101 S. E. 799.

Jennings v. *Jennings*, 88 S. W. 527.

Vulcan Detinning Co. v. *St. Clair*, 145 N. E. 657.

Vilter Mfg. Co. v. *Humphrey*, 112 N. W. 1095.

Flannery v. *People*, 80 N. E. 60.

Richards v. *West*, 3 N. J. E. 456.

Ash-Madden-Rae Co. v. *International Ladies G. W. U.*, 125 N. E. 258.

O'Brien v. *People*, 75 N. E. 108.

Anderson & Lind Mfg. Co. v. *Carpenters' Dist. Council*, 139 N. E. 887.

United States v. *Railway Employees' Dept., A. F. L.*, 268 Fed. 228.

Weston v. *Roper Lbr. Co.*, 73 S. W. 798.

Petitioners contend that the injunctions and contempt order herein will result in the District Court being required to exercise "supervision" of the operations of the railroad company and that by reason thereof the injunctions and contempt order should be set aside. This court has made complete answer to this contention in its decision in *Bitterman* v. *Louisville & N. R. Co.*, 207 U. S. 228, where it said:

"Nor is there merit in the contention that the decision in *New York, N. H. & H. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 404, 40 L. Ed. 526, 26

Sup. Ct. Rep. 272, supports the view here relied upon as to the limited authority of a court of equity to enjoin the continued commission of the same character of acts as those adjudged to be wrongful. On the contrary, the ruling in that case directly refutes the claim based on it. There certain acts of the carrier were held to have violated the Act to Regulate Commerce. The contention of the government was that, because wrongful acts of a particular character had been committed, therefore an injunction should be awarded against any and all violations in the future of the Act to Regulate Commerce. Whilst this broad request was denied, it was carefully pointed out that the power existed to enjoin the future commission of like acts to those found to be illegal, and the injunction was so awarded. The whole argument here made results from a failure to distinguish between an injunction generally restraining the commission of illegal acts in the future and one which simply restrains for the future the commission of acts identical in character with those which have been the subject of controversy, and which have been adjudged to be illegal."

CONCLUSION.

We respectfully submit that the relief sought by petitioners should be denied, and that the judgments and orders of the District Court and the Circuit Court of Appeals should be in all things affirmed.

Respectfully submitted,

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April 21, 1930.

APPENDIX.

Detailed Statement of Facts.

It should not be necessary to burden this court with reading a further statement of the case. But in order to furnish the court with material for checking the large number of inaccuracies and omissions in the statement appearing in the petitioners' brief, it has seemed necessary to present the following detailed review of the facts as shown in the record.

This is a proceeding to review a decree of the Circuit Court of Appeals for the Fifth Circuit entered June 10, 1928 (R. 1147) affirming the final orders and decree of the United States District Court for the Southern District of Texas entered on April 19, 1928, making permanent a temporary injunction entered on August 3, 1927 (R. 82,402) and denying the petitioners' motion to set aside and dissolve an order and decree of contempt entered on February 11, 1928 (R. 263,394).

The suit was brought by way of a class suit, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Southern Pacific Lines in Texas and Louisiana (hereinafter called the "Brotherhood") and H. W. Harper appearing on behalf of themselves and as representatives of the class, the class being the railway clerks in the employ of the Texas & New Orleans Railroad Company (Southern Pacific Lines) in the States of Texas and Louisiana. The suit was against the Texas & New Orleans Railroad Company, praying for an injunction to prevent the defendants (petitioners here) from interfering with, influencing or coercing said railway clerks with respect to their right of self-organiza-

tion and of selecting or designating their representatives for the purpose of considering and deciding certain disputes then pending between said railway clerks and said railroad company.

The suit did not grow out of any dispute between the Brotherhood and the Association, a "company union" fostered by the petitioners herein, as the petitioners apparently would lead the court to believe, but did grow out of disputes between petitioner railroad company and their clerical employees represented by the Brotherhood. The suit was bottomed upon the Act of 69th Congress entitled *"An Act to provide for the prompt disposition of disputes between the carriers and their employees and for other purposes,"* otherwise known as the "Railway Labor Act of 1926." No officials or members of the Association were defendants to the suit as such officials.

The respondent Brotherhood is not itself a national organization or international organization as the petitioners would lead the court to believe. The respondent Brotherhood is a voluntary association, *the membership of which consists solely of railway clerks in the employ of the petitioner railroad company in the States of Texas and Louisiana.* It is also a self-governing part of a national organization. (Rec., 9, 807-811.)

The petition alleges that the Brotherhood has at all times since September, 1918, been specifically authorized by a majority of the 1700 railway clerks employed by petitioner to represent them in all matters relating to their employment, and that this representation had been recognized by the railroad company at all times until shortly prior to the filing of this suit. (Rec., 11, 13, 26-27.)

After reciting the history of relations existing between the Brotherhood and railroad company during the period September 1, 1918, to June 2, 1927, the petition goes on to

allege that on June 2, 1927, Hon. Pat Neff, ex-governor of Texas and then a member of the United States Board of Mediation, arrived in Houston, Texas, to mediate a wage controversy between the railroad company and the aforesaid railway clerks, which was then pending—said railway clerks, acting through the Brotherhood as their representative, having applied to the railroad company for an increase in wages, and which application had been denied by railroad company and finally referred by the Brotherhood to the United States Board of Mediation; that at or about the time of Governor Neff's arrival in Houston, the railroad company and various of its officers and agents unlawfully conspired together "and undertook, instigated and encouraged the formation of a so-called 'company union' of railway clerks * * * to be known as 'the Association of Clerical Employees—Southern Pacific Lines, for the express purpose of *interfering with, influencing and coercing* the said plaintiff railway clerks concerning the formation and maintenance of labor organizations among themselves and the designation by said railway clerks of representatives to represent and act for them in the aforesaid controversy concerning rates of pay then pending before said U. S. Board of Mediation and in other similar matters and to cause a sufficient number of said railway clerks to cancel their authorizations to plaintiff Brotherhood and its representatives to represent them in the aforesaid rates of pay controversy pending before said U. S. Board of Mediation and in similar matters so that the plaintiff Brotherhood and its representatives would not have the authorization of a majority of said railway clerks to so represent them and thus necessitate the plaintiff Brotherhood withdrawing its submission of the rates of pay controversy from the consideration of said U. S. Board of Mediation." (Rec., 26-28.)

The petition then alleges that at the direction and instigation of the railroad company and its general officers, various officers of the railroad company, having and exercising supervisory and directory powers and authority over the said railway clerks, submitted to a large majority of said railway clerks for signature authorizations to said "company union" to represent them and used the influence and authority of their positions in an endeavor to persuade and coerce all of the railway clerks who were subordinate to them and over whom they had the power of hiring, firing and promoting in the service and other similar authority, to sign the said authorizations and renounce the Brotherhood as their representative in the aforesaid rates of pay controversy then pending before the United States Board of Mediation and in other similar matters. (Rec., 28-29.)

Various means and methods employed by the railroad company, its officers and agents to influence and coerce the said railway clerks to cancel their authorizations to the Brotherhood to represent them and accept the "company union" in place thereof as their representative are set forth in detail in the fifth and sixth paragraphs of the petition. (R. 28-37.)

Facts substantiating the truth of the foregoing allegations and setting forth other methods employed by the railroad company to *"interfere with, influence and coerce"* said railway clerks were sworn to by a large number of railway clerks in affidavits appended to and made a part of the petition. (Rec., 48-72.)

It is then alleged that the forgoing matters constituted violation by the railroad company of the provisions of the Railway Labor Act of 1926, particularly Section 2 thereof, which provides in part as follows:

"Third. Representatives, for the purposes of this Act (chapter), shall be designated by the respective

parties in such manner as may be provided in their corporate organization or unincorporated association or by other means of collective action, *without interference, influence or coercion exercised by either party over the self-organization or designation of representatives by the other.*"

The petition next sets forth contract, property and other rights of said railway clerks which were being violated by the railroad company; sets forth appropriate allegations showing the necessity for immediate relief to prevent said railway clerks being deprived of such property rights and other rights; sets forth appropriate jurisdictional allegations; and ends with a prayer for appropriate relief.

A hearing was had on the petition and the *ex parte* affidavits attached to the petition and on further *ex parte* affidavits submitted by both parties (R., 411-459) and a temporary injunction was entered in said suit enjoining and restraining the railroad company, its officers, servants and agents from in any way or manner interfering with, influencing, intimidating or coercing any of the aforesaid railway clerks with respect to their free and untrammeled right of selecting or designating their representatives for the purpose of considering and deciding any and all disputes between said railway clerks and said railway company, and further enjoining and restraining said railroad company, its officers, servants and agents, from in any way or manner interfering with, influencing, intimidating or coercing any of said railway clerks with respect to their free and untrammeled right of self-organization. (R., 82-84.)

In view of the contentions which have been advanced by petitioners as to the nature and scope of this injunction, we think it important that this Court read the opinion of the District Court delivered in open court and with the peti-

tioners present. This opinion is not reported but appears at pages 76-82 of the Record.

A few months later there was filed in the District Court in this same case a bill of complaint or information (hereinafter referred to as the "information"), charging the railroad company and certain of its officers, H. M. Lull, Executive Vice-President, G. S. Waid, Vice-President and General Manager, Texas Lines, and J. G. Torian, Assistant to Vice-President and General Manager and in charge of personnel, the petitioners herein, with having violated the provisions of the temporary injunction theretofore entered and by reason thereof being in contempt of the District Court. (Rec., 91-162.)

The information alleged that immediately following the entry of the temporary injunction, to-wit: on the following day, the petitioners proceeded knowingly, wilfully and with unlawful intent to ignore, violate and disregard the temporary injunction. The information further alleged that thereafter said petitioners had continuously carried on and put into effect a studied course of systematic interference, influence and coercion directed towards the railway clerks. Supplementing these general allegations and explanatory thereof, the information set forth fully and in detail separate and distinct overt acts accomplished by different and various officers of the railroad company, particularly those officers complained against in the information—all alleged to be a part of the unlawful conspiracy charged in the information. (Rec., 91-162.)

The petitioners' answer admitted substantially all of the allegations of fact in the information except that it denied that the Brotherhood held authorizations from a majority of the railway clerks but claimed that the Associaion did hold the authorizations of a majority of said railway clerks

and also denied that the petitioners had violated the temporary injunction. (Rec., 165-185.)

At the hearing on the contempt proceedings numerous affidavits and considerable documentary evidence were offered by both parties and a number of witnesses were examined in open court. (Rec., 459-576.)

The District Court, in its opinions (24 Fed. (2nd) 426, 25 Fed. (2nd) 873, and 25 Fed. (2nd) 876) has set forth, amply supported by numerous references to the evidence, numerous acts of the petitioners in contempt of the temporary injunction. These opinions, together with the oral opinion delivered by the District Court at the time of the granting of the temporary injunction and the opinion of the Circuit Court of Appeals, are set forth in convenient form for the use of this Court in the brief filed by appellees in this Court in opposition to the application for writ of certiorari. The Circuit Court of Appeals reviewed this evidence and approved the findings of the District Court.

We will refer to a few of such contemptuous acts, giving the references in the Record where the supporting evidence may be found. The District Court points out that the genesis and motive of the entire activities of the petitioners in organizing, promoting and maintaining the Association and in endeavoring to disrupt and unseat the Brotherhood as representative, is made clear and plain through a letter written by petitioner Lull, Vice-President of the railroad company, to President McDonald of the railroad company, on May 24, 1927, just prior to the activities complained of in this suit. (R. 772, 396-398, appellees' brief filed in opposition to application for writ, p. 41.) That letter in brief declared that there was pending from the Brotherhood a request for an increase in wages of 10 cents per hour, which had been referred by the Brotherhood to the Board of Mediation, after the failure of conferences;

that it was practically certain, if the matter went to arbitration, an award would be rendered increasing the payroll $340,000 per annum; that he proposed to refuse mediation and arbitration upon the question of the right of the Brotherhood to represent the employees, and stated: "This will permit us to get away from the interference of this organization (Brotherhood), and if successful in this I am satisfied we can make settlement with our own employees at a cost not to exceed $75,000 per annum." (R. 772, 396-398.) As the District Court stated (R. 396-7), every proceeding taken thereafter sprang from and may be read in the light of this program, which explains the vigorous and determined effort to seat the "company union" (Association) as sole representative of the employees, and gives color to the persistent efforts thereafter to destroy the influence and activity of the Brotherhood.

The District Court points out that organizers of the "company union" were sent out on the railroad company's time, and on its pay, and with its consent and approval, and under the aegis of its authority, to organize the Association. These organizers were permitted to devote all their time for many days and part of their time over a long period to this organization work, and received their full pay during this time from the railroad company. The railroad company's Vice-President and General Manager, G. S. Waid, testified that the railroad company considered this work to its interest. This organization work continued long after the entry of the temporary injunction, the organizers then being engaged in getting *members* in the "company union," and not merely authorizations as before the injunction. (R. 138, 459, 513-515, 615, 616, 657, 741-2, 747-8, 758, 1020.) The chairman of the "company union" rendered written reports setting forth the progress of the "company union" to J. G. Torian, assistant to Vice-President and Gen-

eral Manager of the railroad company, and asking for information and instructions from said Torian. (Rec., 781-3, 785-791.)

On the other hand, as the District Court points out, the general chairman, Harper, and general secretary-treasurer, Walker, of the Brotherhood, were discharged from the railroad company's service without cause and without notice (as to Harper, R. 138-140, 459, 518, 622-3, 658, 659-660, 797-800; as to Walker, R. 140-141, 459, 501-503; 660, 797, 798, 800-803), and their passes over the railroad company's lines cancelled (as to Harper, R. 518, 623-5, 659-660, 795-598; as to Walker, 501-503, 518, 661, 797-798), despite the fact that they had been granted indefinite leaves of absence for the express purpose of performing such services, and that the railroad company's Vice-President and General Manager, Waid, testified that it was usual and customary for such officers of railroad labor organizations to be continued for years on such leaves of absence, to have pass privileges, and when their services as such officers of such labor organizations were terminated they were given the opportunity to return into the actual service of the railroad company without loss of seniority rights. (Rec., 508-513, 602-613.)

Also, as the District Court points out, members of the Brotherhood had their pay docked for time spent in conferring with the railroad company's Executive Vice-President Lull (R. 694-695), and other members of the Brotherhood have been dismissed from the railroad company's service because of their activities in the Brotherhood. (Rec., 495-498, 670-2, 498-9, 491-494, 672-7.)

Another glaring instance of violation of the temporary injunction pointed out by the District Court was the exclusion of representatives of the Brotherhood from wage conferences. On September 28, 1927, there was held in the

Division Superintendent's office of the railroad company at El Paso, Texas, a conference to revise the wage scale of clerical employees of the El Paso Joint Terminal, part of whom were employees of the Pacific System of the Southern Pacific Lines, and part employees of the petitioner railroad company. The employees of the Pacific System were represented at said conference by representatives of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees—Southern Pacific Lines, Pacific System, but J. G. Torian, assistant to Vice-President and General Manager of the petitioner railroad company, caused H. W. Harper, General Chairman of the plaintiff Brotherhood, who held the specific authorizations and instructions of a majority of the clerical employees of the petitioner railroad company in said El Paso Joint Terminal to attend said conference and represent them, to be excluded from said conference by physical force, and admitted to said conference to represent said clerical employees representatives of the "company union" who did not hold the authorizations or instructions of any of said clerical employees to represent them at said conference. (R. 123-134, 459, 504, 507, 656-657, 821-2.)

The Record fairly teems with further evidences of violation of the temporary injunction, but we will not burden the court further in this connection. We would, however, again refer this court to the opinions of the District Court which not only discuss the facts at length but are masterful expositions of the law applicable to the questions arising in this case. Reference should be made to the official reporter for the opinions or to appellees' brief filed in opposition to the application for writ of certiorari, because of the garbled way in which they have been printed in the Record, footnotes being intermingled with the bodies of the opinions in such manner as to make them more or less unintelligible.

There are a number of inaccuracies in petitioners' statement of the evidence and its effect appearing in their brief. For example, it is stated that the Association at the time of recognition by the railroad company had authorizations from a majority of the railway clerks to represent them and that the railroad company acted in "good faith" in recognizing the Association on August 6, 1927, just three days after the entry of the temporary injunction. The inaccuracies in the statement are two-fold. First, the "company union" did not hold the authorizations of a majority of the clerical employees. Second, what authorizations it did hold had been obtained by reason of the *influence, interference and coercion* of the petitioners, and the District Court held they were not a proper basis for designating a representative. (R. 80, 261.) On pages 186-219 of the Record in this case appears a careful analysis of the authorizations to the "company union," and it clearly shows that the "company union" held the authorizations of *far less* than a majority of the clerical employees. The District Court so found, saying:

> "Not only did the railroad company, with a sheer and gratuitous wantonness of spirit, reject the offices of the Board of Mediation, created and operating under this same Act, before whom, at the time of the filing of this suit, a wage dispute initiated by the Brotherhood was pending, but before the ink was hardly dry upon the order of injunction proceeded to nullify it by recognizing as truly representative the Association, all of whose authorizations had been filed with the defendant Torian before this suit was filed, and the most of which had been obtained, as found by the court, by the use of means in violation of the statute. And this recognition was accorded, and action taken under it, in the face of the statute, and of Torian's affidavit filed herein, that he would not consider these authorizations until the board has so relinquished.
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> "In the view which I have taken that the authoriza-

tions on which the company acted were procured in violation of the law, it would serve no purpose to extend this opinion further by a discussion of the hypothesis whether, if lawfully obtained, they were sufficient in number. Entertaining that hypothesis, however, for a moment, I think it plain that there were not sufficient authorizations of those qualified to vote, to constitute a majority. (R. 256, 261.)

On the other hand, the Brotherhood had been the recognized representative of the clerical employees for 9 years (R. 815-819), and on July 29, 1927, just 8 days prior to the recognition of the "company union," there had been offered in evidence in this suit without objection from petitioners more than 1100 authorizations of said clerical employees to the Brotherhood to represent them. (R. 453.)

At pages 9 and 28 of petitioners' brief it is stated in substance that all authorizations to the "company union" were secured by mere "clerks" and by three agents of the railroad company and that the higher officials of the railroad company were not advised of such activities on behalf of the Association and were in no way implicated. At page 10 it is stated that the threats of losses of vacations and pass privileges were made by mere clerks and the inference is left that such threats were not made by higher officials of the railroad company. At page 16 it is stated after the entry of the temporary injunction "all activity on the part of officers and agents of the railroad company in the matters complained of in the bill and affidavits ceased." That there is no essence of truth in any of the foregoing statements appears clearly from the findings of the Circuit Court of Appeals, substantiating the findings of the District Court above quoted to the same effect, as follows:

"Evidence in support of the allegations of the information included evidence to the effect that *after the injunction was issued* the Railroad Company, acting through agents authorized by it, brought to bear upon

clerks in its employ who were members of the Brotherhood or eligible to membership therein influence and pressure, including promises and threats, to induce such employees to renounce the Brotherhood as the representative of such clerks in dealings with their employer as to rates of pay, rules and working conditions, and to consent to the Association being the representative of such clerks in such dealings; * * * deprived of passes employees who, while on leave of absence without pay, acted as officers of the Brotherhood, and dismissed from the service employees who acted for the Brotherhood, because they so acted; and formally recognized and dealt with the Association as the sole authorized representative of such clerks in dealings with the Railroad Company as to wages and working conditions." (Rec., 1142.)

Again it is stated in petitioners' brief that three clerks, Stotzer, Hudson and Ginsburg, members of the Brotherhood, were discharged by the railroad company for causes not connected with their membership in the Brotherhood or with this litigation. (Petitioners' brief, pp. 3, 7, 13.) That the facts are to the contrary appears from the District Court's opinion denying petitioners' motion to vacate the contempt order, 25 Fed. (2nd) 876, where it said:

> "As to the restoration of Harper, Walker, Stotzer, Hudson and Ginsburg, this also was merely an Act of restoration of status, commanded in order to wipe out the effects and results of disobedience. Nothing in the order attempted to, nor could it, fix any time or conditions to the continuing in place of these persons. It merely declared that the severance of these relations and the disturbance of the status quo as to them, which the court found from the evidence had been brought about through a deliberate violation of the injunction order of the court, must be undone, and inferentially that it should not occur again for the same or similar reasons."

In the meantime respondents had filed an amended original bill of complaint which was substantially the same as

the original bill, except that only the Texas & New Orleans Railroad Company was named as a defendant, and in addition to the details, particulars, et cetera, of influence, interference and coercion set forth in the original bill, this amended bill included most of the allegations of fact contained in the contempt information. (Rec., 314-373.)

There was also filed a bill of intervention by four individual clerical employees of the railroad company in the States of Texas and Louisiana—these individual employees intervening as parties plaintiff and adopting all of the pleadings of the original plaintiffs. (Rec., 381-384.)

The amended bill of complaint, as well as the intervention of the individual parties plaintiff, were also amended so that the prayers for relief conformed substantially to the relief theretofore granted in the temporary injunction. (Rec., 385-387.)

The final trial and hearing was held on March 12 to 15, 1928, and involved determination of three separate and distinct phases of this controversy, namely: First: Defendants' (petitioners here) motion to vacate the contempt order; Second: Defendants' (petitioners here) motion to dissolve the temporary restraining order; and, Third: A final hearing or trial on the permanent injunction.

Following the final hearing the District Court entered its orders denying the petitioners' motion to dissolve the temporary injunction and to vacate the contempt order (Rec., 394-395), and making the temporary injunction permanent. (Rec., 402-404.) The Circuit Court of Appeals affirmed each of the orders of the District Court (Rec., 1147), and denied the petitioners' motion for rehearing. (Rec., 1165.)

The District Court's order held and adjudged in contempt the railroad company and three of its principal

officers, the petitioners herein. This order was not an enlargement or extension of the original injunction, as the petitioners in their brief would lead this court to believe, but simply a holding and decree that the petitioners had in fact, and with deliberate purpose and design, knowingly violated the solemn order of the court—the order further providing certain conditions upon which the petitioners might purge themselves of such contempt. (Rec., 263-268.)

Petitioners have never seriously contested the sufficiency of the evidence offered on the final hearing. In other words, all of their claims and contentions with respect to what the evidence showed have been directed toward testimony adduced in the earlier hearings. They have contented themselves with calling attention and referring only to parts of the evidence adduced on the hearings on the application for the temporary injunction and on the contempt proceedings. At page 21 of their petition for writ of certiorari, in dealing with the final hearings, they admitted that "all of the affidavits and pleadings of both parties which had been used in the prior proceedings were introduced in evidence, *additional affidavits and documents* were introduced and oral testimony was taken." (Italics ours.) There were something over 500 pages of additional testimony adduced upon this final hearing and trial, a large number of witnesses being examined by both parties and voluminous documentary evidence admitted. (R. 576-1092). Since petitioners have made practically no reference to this vast amount of additional testimony adduced for the first time upon the final hearing, we take it that any serious question about the sufficiency of the evidence on said final trial and hearing is, in effect, waived by petitioners and we think advisedly so. The District Court said in discussing the evidence introduced on the final hearing:

> "On this hearing the evidence more abundantly even than on the previous hearings established a deliberate

disregard and violation of the terms of the statute, and, after its issuance, of the temporary injunction, by the defendant company through a calculated and studied interference, both with the self-organization, and the designation of representatives by the employees." (25 Fed. (2nd) 873.)

In view of the foregoing there are left for determination by this court only such questions of law as are raised by petitioners' brief. No new questions of law are raised by petitioners in this court. Each and every point of law raised in petitioners' brief was presented to the District Court and again to the Circuit Court of Appeals for the Fifth Circuit and fully answered by those courts in carefully considered opinions. All of petitioners' arguments are refuted by the unanswerable logic of those opinions. See 24 Fed. (2nd) 426; 25 Fed. (2nd) 873; 25 Fed. (2nd) 876; and 33 Fed. (2nd) 13.

(End of Appendix. Brief ends page 141.)